FILE COPY

JAN 9 1

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 379

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,

Appellants,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, APPELLEE.

O. W. DYNES,
M. L. BLUHM,
C. L. TAYLOR,
Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellee.

J. N. DAVIS,
Of Counsel.

THE SUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

	Page
Opinions below	1
Questions presented	2
Statute involved	2
Statement	3
Summary of Argument	12
Argument:	
I. The Interstate Commerce Commission can exercise its power under Section 15 (7) of the Interstate Commerce Act to require a cancellation of schedules stating new rates only after a hearing and appropriate findings supported by substantial evidence that the proposed rates are unlawful	15
The carrier has the right to initiate rates	15
The Commission can only require the cancellation of schedules proposing new rates when after hearing there is a finding supported by evidence that such proposed rates are unlawful	17
The Commission exceeded its power and its order is not supported by substantial evidence and essential findings	18
The findings in the first report of the Commission	20
The mere statement in the words of the statute that the proposed rates were unreasonable in violation of Section 1 (5) was not an adequate finding and there was no substantial evidence that the rates were unreasonable	23

The finding of the Commission that the proposed rates would cause a disruption of the individual groups from which the rates are proposed and the rate relation existing between the several Indiana groups, and a disruption of the rate structure on coal in Indiana and related areas..... 28

The finding that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in Indiana and related areas, impairing the revenue of carriers serving those areas, and their ability to provide adequate and efficient transportation service contemplated by Section 15-a (2) of the Act..... 30

II. The Decree of the District Court should be affirmed as the Commission acted arbitrarily and beyond its statutory power, and the order was not supported by appropriate findings and by substantial evidence 34

III. The Commission did not exercise its power to prescribe a minimum rate under Section 15 (1) of the Act 37

IV. The Commission's power to prescribe just and reasonable rates under Section 15-a (2) of the Act as amended 38

Conclusion 40

Appendix 41

The Commission's first report..... 41

The Commission's second report..... 47

Memorandum opinion of the District Court..... 64

Statute .....

CITATIONS.

Cases.

Anchor Coal Company v. United States, 25 F. (2) 462 ..... 12, 21, 25

Atchison, Topeka & Santa Fe Railway Company v. United States, 279 U. S. 768 22

Beaumont, Sour Lake & Western Ry. Co. v. United States, 282 U. S. 74 ..... 18, 23, 36

Chicago Junction Case, 264 U. S. 258, 265 35

Coal from Indiana to Illinois, 197 I. C. C. 245; 200 I. C. C. 609 1

Florida v. United States, 282 U. S. 194 ..... 18, 23, 36

Florida v. United States, 292 U. S. 1 39

Illinois Coal Cases, 1920, 62 I. C. C. 741 7

Illinois Indiana Coal Cases, 128 I. C. C. 265 ..... 7, 9, 32

Indiana & Illinois Coal Cases, 40 I. C. C. 603 7

Interstate Commerce Commission v. L. & N. Railway Company, 227 U. S. 88 ..... 13, 17, 35, 36

Interstate Commerce Commission v. Railway Company, 167 U. S. 479 24

Interstate Commerce Commission v. Union Pacific, 222 U. S. 541 35

Intrastate Rates on Bituminous Coal in Illinois, 182 I. C. C. 537 ..... 8, 26, 32

Jefferson Island Salt Mining Co. v. United States, 6 F. (2) 315 39

Norwegian Nitrogen Products Company v. United States, 288 U. S. 294 ..... 23, 36

Skinner & Eddy Corp. v. United States, 249 U. S. 557 .. 37

Southern Pacific v. Interstate Commerce Commission, 219 U. S. 433 19

Texas & Pacific Railway Co. v. United States, 289 U. S. 627 ..... 12, 15, 17, 27, 38

United States v. Illinois Central Railroad Company, 263 U. S. 515 ..... 12, 15

Statutes.

Interstate Commerce Act as amended:

Sec. 1 (5) (C. 104, 24 Stat. 379, as amended, C. 3591, 34 Stat. 584, C. 309, 36 Stat. 539; C. 91, 41 Stat. 474; U. S. C., Title 49, Sec. 1) 70

Sec. 15 (1) (C. 91, 41 Stat. 484, U. S. C., Title 49, Sec. 15) 70

Sec. 15 (7) (C. 309, 36 Stat. 551, C. 91, 41 Stat. 484; C. 510, 44 Stat. 1447; U. S. C. Sup. VII, Title 49, Sec. 15 (7) 71

Sec. 15a (2) (C. 91, 48 Stat. 220; U. S. C. Sup. VII, Title 49, Sec. 15a) 72

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 379

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,

Appellants,

—*vs.*—

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,

Appellees.

BRIEF FOR THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

OPINIONS BELOW.

The decision of the specially constituted District Court (R. 48) has not been reported. The two reports of the Interstate Commerce Commission (R. 7, 34) *Coal from Indiana to Illinois,* are reported in 197 I. C. C. 245, and 200 I. C. C. 609. This decision and the two reports are set forth in the Appendix to this brief.

Questions Presented.

The controversy involves the validity of an order of the Interstate Commerce Commission requiring the cancellation of schedules proposing reduced rates on bituminous coal to apply from mines on the Chicago, Milwaukee, St. Paul and Pacific Railroad Company in Indiana to destinations in northern Illinois. The determination involves the questions:

1. Whether a carrier may initiate rates, not shown to be unlawful, to meet competitive conditions and thus retain traffic it has enjoyed for many years.

2. Whether the Commission can lawfully require the cancellation of rates not found or shown by the evidence to be unreasonable.

3. Whether the fact that proposed reduced rates will disrupt present relationships, which relationships were not prescribed by the Commission and not shown to be lawful, presents a legal justification for the action of the Commission in requiring their cancellation.

4. Whether the action of the Commission was arbitrary because its findings and order were not supported by substantial evidence.

5. Whether the Commission misconceived its power and exercised power not delegated by Congress.

Statute Involved.

The pertinent provisions of the Interstate Commerce Act are printed in the Appendix (pp. 70-72).

STATEMENT.

This is an appeal from a final decree of the specially-constituted District Court of the United States for the Northern District of Illinois, enjoining an order of the Interstate Commerce Commission entered November 8, 1933, in a proceeding entitled "Investigation and suspension Docket No. 3843, Coal from Indiana to Illinois." (R. 12) The order required the appellee, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter referred to as the Milwaukee, to cancel a tariff proposing certain reduced rates for the transportation of coal from mines on its line in Indiana to thirty-eight destinations also on its line in northern Illinois.

These proposed reductions were published to restore a long standing relationship in rates between those applicable from mines on the Milwaukee in Indiana, to these destinations, on the one hand, with those applicable from Illinois and Western Kentucky to the same destinations, on the other, which relationship had been disrupted following an order of the Illinois Commerce Commission, effective August 20, 1930, fixing intrastate coal rates.

Reports of the Commission and the Opinion of the District Court.

The Commission filed two reports in this proceeding. The first, by Division 2 (R. 7) dated November 8, 1933, for the convenience of the court, is set out in full in the Appendix. (p. 41) Following this report the Chicago, Milwaukee, St. Paul and Pacific Railroad Company filed its petition for reconsideration, rehearing and reargument before the entire Commission (R. 223) which petition was denied by the Commission on February 5, 1934 (R. 231) Following

the denial of the petition for rehearing and on February 14, 1934, the Bill of Complaint (R. 1) was filed in the United States District Court for the Northern District of Illinois. The Commission then on its own motion, March 7, 1934, reopened the proceeding for argument (R. 35) and on April 18, 1934, two days before the suit was to be heard in the District Court, filed the second report, (R. 34) which is also set out in the Appendix. (p. 47) The cause came on to be heard in court on April 20, 1934, and an interlocutory injunction was issued. (R. 29) The court on June 13, 1934, filed its memorandum opinion (R. 48) also set out in the Appendix. (p. 64) On June 13, 1934, the court filed its findings of fact and conclusions of law (R. 54) and on June 21, 1934, the court entered the final decree (R. 56), permanently enjoining the enforcement of the Commission's order.

THE MINING GROUPS AND THE DESTINATION TERRITORY.

Reference is made throughout the record to certain mining groups, in which bituminous coal is produced and sold in the destination territory. The relative locations of these mining groups are shown on Exhibit 5 (opposite R. 149). These mining groups are located in the states of Illinois, Indiana and Kentucky and those with which we are here concerned are the Springfield and Southern Illinois groups in Illinois, the Brazil-Clinton and Linton-Sullivan groups in Indiana and Western Kentucky group in Kentucky. The destinations to which the proposed rates apply are all located on the Milwaukee and are shown on the map, Ex. 5 (R. 149) and are listed in the tariff (R. 63). These include among others, Freeport, Rockford, Elgin and DeKalb, which are important industrial cities where large quantities of coal are consumed. There is keen competition in

the sale of coal in these cities and the carriers are also in competition in their efforts to transport coal from the different origins to these destinations.

The Milwaukee Railroad, Appellee.

The Milwaukee operates a line of railway extending from points in Indiana to destinations in northern Illinois and beyond in other states. (Ex. 5, R. 149.) It serves a number of coal mines in Indiana in the Brazil-Clinton and Linton-Sullivan groups. The Milwaukee does not serve any of the Illinois mining groups nor Western Kentucky and except through its connections it cannot transport coal from these origins.

For many years the Milwaukee and its predecessors have transported coal from the Indiana mines on its line to destinations in northern Illinois and to other states and this coal movement is an important part of its traffic over that part of its line extending into Indiana. By its single line of railway it transports coal from the Indiana mines to each of the thirty-eight destinations in northern Illinois to which the proposed rates apply.

Railroads and Others Opposing the Proposed Reduced Rates.

Coal bureaus representing coal producers in the Springfield and Southern Illinois groups opposed the proposed reduced rates. Certain railroads serving mines principally in Illinois and Western Kentucky appeared at the hearing before the Commission, the Illinois Central, however, being the only railroad to offer testimony against the proposed reductions. Although several different railroads serve mines in all of the Indiana mining groups, the Illinois Central Railroad, which reaches mines in the Linton-Sullivan Indiana group, was the only Indiana line to oppose the re-

ductions in rates or to participate in the proceedings in court. That railroad is one of the principal lines serving mines in the Springfield, Southern Illinois and Western Kentucky groups.

The Proposed Rates.

By tariff filed with the Commission to become effective December 23, 1932 (R. 60) the Milwaukee proposed reduced rates on bituminous coal from mines on its line in the Brazil-Clinton and Linton-Sullivan mining groups in Indiana to thirty-eight destinations in northern Illinois. The most distant cities to which the rates would apply were Rockford and Freeport. To these cities the rates were reduced from $1.87 per ton to $1.70 per ton from the mines in the Brazil-Clinton group and from $1.92 per ton to $1.75 per ton from the mines in the Linton-Sullivan group. The same rates were published to apply on coal to the other destinations, but as these stations in the past had not all been accorded the same rate, the reduction in cents per ton varied from 4 cents to 17 cents.

History of the Rates.

The keen commercial and carrier competition at these important markets has existed for many years and the relationship in the rates applicable for the movement of coal from the different origins is most important not only to the railroads but also to the operators of the mines.

Exhibit 2 (R. 144) is a statement showing the history of the rates applicable for the transportation of bituminous coal from the Clinton and Linton, Indiana, and the Springfield and Southern Illinois mining groups to Rockford and Freeport, Illinois. From April 1, 1913 to August 20, 1930, rates for the transportation of bituminous coal from the Clinton, Indiana, group to Rockford, Illinois, were, with un-

important exceptions, the same as the rates from the Springfield, Illinois, group to Rockford. Prior to April 1, 1913, the rates from the Clinton, Indiana group to Rockford were lower than the contemporaneous rates from the Springfield, Illinois group to the same destination. From October 10, 1922 to August 20, 1930, the rates on bituminous coal from the Clinton group to Freeport, Illinois, were the same as were the contemporaneous rates from the Springfield, Illinois, group to Freeport, Illinois. The rates from the Southern Illinois group to destinations in northern Illinois, including Rockford and Freeport, have been for many years and are today thirty cents per ton over the applicable rate from the Springfield, Illinois, group to the same destinations. (R. 144)

While the relationship between the rates from Indiana to northern Illinois, with those from the Illinois origins to northern Illinois, has never been prescribed by the Commission, the existence of such relationship has frequently been considered and commented upon by the Commission. *Indiana and Illinois Coal*, 40 I. C. C. 603; *Illinois Coal Cases, 1920*, 62 I. C. C. 741; *Illinois-Indiana Coal Cases*, 128 I. C. C. 265.

This relationship in the rates between those applicable from the mines in Indiana and those from Illinois was disrupted on August 20, 1930, when the order of the Illinois Commerce Commission reducing the intrastate rates on bituminous coal 17 cents per ton from the Springfield and Southern Illinois groups to Rockford and Freeport became effective. (R. 72 and 144) This placed the Springfield, Illinois, group on a basis of 17 cents per ton under the rates applicable from the Brazil-Clinton, Indiana group, and 12 cents per ton under those applicable from the Linton-Sullivan, Indiana group, and likewise reduced the differential of those Indiana groups under Southern Illinois. (R. 144)

Following the order of the Illinois Commerce Commission, the Illinois Central, the Milwaukee and other interested carriers filed a petition with the Interstate Commerce Commission, alleging a violation of Section 13 of the Interstate Commerce Act, and requested the Interstate Commerce Commission to require the intrastate rates on coal within Illinois to be increased, charging that the rates required by the Illinois Commerce Commission to be assessed as maxima for the transportation of coal within Illinois from mines in that state to Rockford and Freeport, were unlawful as causing undue and unreasonable advantage, preference and prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other, and as unjustly and unreasonably discriminating against interstate commerce. A hearing was had on that complaint and the Interstate Commerce Commission refused to require the intrastate rates within Illinois to be increased. The Commission's report in that proceeding is entitled *"Intrastate Rates on Bituminous Coal in Illinois,"* 182 I. C. C. 537.

In that report the Commission dealt with the rates from Illinois origins to Dixon, Freeport and Rockford. Dixon is not involved in this proceeding. Appellants, by brief, call attention to the Commission's quotation from that report (R. 36) in which reference is made to low rates from Indiana. The Commission referred to the rates to Dixon and the rates from distant Indiana groups as being low and none of those rates are involved in this proceeding. It appears from the report in that case, page 549, that the Commission recognized that unless the Illinois rates were increased, reductions in rates from Western Kentucky and Indiana would inevitably follow.

Thereafter, without protest or objection on the part of the Commission, railroads or other interested parties, the

rates on bituminous coal from Western Kentucky were permitted to be reduced 17 cents per ton. (Exhibit 6, R. 149.) The Illinois and Western Kentucky rates having been reduced, there remained only the rates from the Indiana mines which were out of line with the long existing relationship, and following the refusal of the Interstate Commerce Commission to require the intrastate rates to be increased, and, to restore the pre-existing relationship, the Milwaukee Railroad filed its tariff with the Commission, proposing the same reductions in cents per ton as has been required within Illinois.

The rates from Western Kentucky to northern Illinois were reduced 17 cents per ton, the same amount as that required within Illinois, on the theory that the outstanding order of the Commission in *Illinois-Indiana Coal Cases*, 128 I. C. C. 265, decided June 14, 1927, had definitely fixed the differential relationship between Western Kentucky and Illinois on coal moving to destinations in northern Illinois.

In the *Illinois-Indiana Coal Cases, supra,* the Commission had definitely before it the relationship in the rates on coal from Indiana, Illinois and Western Kentucky to destinations in northern Illinois. At that time, 1927, (R. 144) the rates from the Springfield, Illinois, group and the Brazil-Clinton, Indiana, group were the same, and the Southern Illinois rates were 30 cents per ton over these rates. The rate from Western Kentucky to the same destinations was 25 cents per ton over that applicable from Southern Illinois. In that report the Commission required the differential between the rates applicable from Western Kentucky and those applicable from the Indiana and Illinois mines to be increased 10 cents per ton and found on page 284:

> "We further find that the interstate rates assailed are not otherwise unreasonable, but that the relationship between the rates from Illinois to points in Illinois, Indiana, Michigan, Wisconsin, Minnesota, North

Dakota, South Dakota, Nebraska, and Iowa, and from Indiana to points in Illinois and Wisconsin, on the one hand, and mines in Western Kentucky, on the other, results in undue prejudice to mines in Illinois and Indiana and in undue preference of mines in Western Kentucky; that said undue prejudice and preference is due to the maintenance of unreasonably low rates from mines in Western Kentucky and should be removed by increasing the rates from said mines in the amount of 10 cents per net ton to all destinations in the States named to which the existing differential of Western Kentucky over the Southern Illinois group is 25 cents per net ton."

This was a definite finding that the then existing relationship between the rates from Western Kentucky to northern Illinois on the one hand and those applicable from Indiana and Illinois to Northern Illinois on the other, was unduly prejudicial to Indiana and Illinois. By the reductions from Western Kentucky which the Commission has permitted the prejudice which the Commission required to be removed was again established and in fact increased as the Commission had found that a differential of 55 cents per ton as between Brazil-Clinton and Western Kentucky was unlawful and required it to be increased to 65 cents. By the reduced rates from Western Kentucky, that differential has been reduced to 48 cents per ton. The rates which the Milwaukee Railroad published and which the Commission required to be canceled would restore the differential in the relationship which the Commission required in the *Illinois-Indiana Coal Cases, supra,* and would restore the long existing relationship which had existed between rates from the affected mines in Indiana with those from Illinois to the destinations named.

The long existing relationship in these rates from the different mining origins to northern Illinois, disturbed by the order of the Illinois Commerce Commission, effective August 20, 1930, apparently fairly met the needs of the pro-

ducers of coal in the different origins, although under those rates the Illinois mines had been able to sell much larger quantities of coal at the destinations than had those in Indiana. (R. 217)

While it was not contended by the Milwaukee that the then existing or the proposed rates were maximum reasonable rates, they were not shown to be unreasonably low and were shown to be necessary to meet competitive conditions and to restore long standing relationships with competing Illinois mines. Though other railroads serve other mines in the Brazil-Clinton and Linton-Sullivan groups, the routes from those mines to the destinations are circuitous as contrasted with the short single line of the Milwaukee (R. 149) and it was undisputed that the Milwaukee transported 99 per cent of the coal moving from these groups to Rockford and Freeport (R. 82, 86).

The District Court enjoined the enforcement of the order and found that the Commission's findings were not supported by substantial evidence.

SUMMARY OF ARGUMENT.

I.

The Interstate Commerce Commission can only require schedules stating new rates to be canceled under Section 15 (7) of the Interstate Commerce Act when after hearing such rates are found from substantial evidence, to be unlawful. A carrier has the right to initiate rates and to adopt such policy of rate making as to it seems wise and necessary to meet competitive conditions. *United States* v. *Illinois Central Railroad,* 263 U. S. 516, 522. *Texas & Pacific Railway Company* v. *United States,* 289 U. S. 627, 636. The Commission's order was void as it erroneously required the Milwaukee to justify the proposed reduced rates contrary to the provisions of Section 15 (7). *Anchor Coal Company* v. *United States,* 25 F. (2) 462.

The Commission stated that the proposed rates violated Section 1 (5) and 15-a (2) of the Interstate Commerce Act. There was no appropriate finding except the mere statement of the Commission in the words of the statute that the rates were unreasonable in violation of Section 1 (5) of the Act, and there was no substantial evidence to support a finding that the rates were unreasonably low. The Commission's finding that the proposed rates would disrupt relationships between mines and mining groups was not a finding that the rates were unlawful, as the Commission had not prescribed the existing relationships and did not find in this proceeding that they were lawful. There was no substantial evidence that the proposed reduced rates would result in revenue loss to the Milwaukee or that such reductions would result in revenue loss to other carriers, and the facts

did not warrant a finding that the rates were in violation of Section 15-a (2) of the Act.

II.

The entire record, including all of the testimony which was before the Commission, was offered in evidence at the hearing in the District Court. That court correctly held the order to be void and enjoined its enforcement as there was no substantial evidence that the proposed rates were unlawful in violation of the Act. The competency and sufficiency of the evidence to support an order and the determination as to whether or not the Commission acted within its delegated authority, are questions of law which the court will review. *Interstate Commerce Commission* v. *L. & N. Railway Company,* 227 U. S. 88, 92, 93.

III.

While Section 15 (1) of the Act as amended empowers the Commission to prescribe either maximum or minimum or maximum and minimum rates to be charged, the Commission did not in this proceeding exercise this power and fix a minimum rate or any rate, and the issues and evidence before the Commission did not warrant its exercise of such power.

IV.

Section 15-a (2) of the Act as amended June 16, 1933, defines certain factors to which, among others, the Commission shall give consideration in the exercise of its power to prescribe just and reasonable rates. While perhaps the amended statute prescribes a new rule for rate making, it is not essential to the determination of the issues in this

proceeding to determine to what extent the changes affected the Commission's authority as there was no substantial evidence that the proposed rates violated the provisions of either the original Act or of the Act as amended. The District Court properly found that there was no substantial evidence that the proposed rates would adversely affect the revenue of the Milwaukee or other railroads or that such rates would threaten an adequate, efficient railway transportation service.

ARGUMENT.

I.

THE INTERSTATE COMMERCE COMMISSION CAN EXERCISE ITS POWER UNDER SECTION 15 (7) OF THE INTERSTATE COMMERCE ACT TO REQUIRE A CANCELLATION OF SCHEDULES STATING NEW RATES ONLY AFTER A HEARING AND APPROPRIATE FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE THAT THE PROPOSED RATES ARE UNLAWFUL.

1. *A carrier has the right to initiate rates.*

The Milwaukee Railroad, appellee, by appropriate schedules proposed reduced rates for application over its line on bituminous coal from mines on its railroad in the Brazil-Clinton and Linton-Sullivan Districts in Indiana, to thirty-eight named destinations in northern Illinois. That a carrier has the right to initiate rates will not be disputed. This court has repeatedly so held.

In *United States* v. *Illinois Central Railroad,* 263 U. S. 515, at page 522, decided January 7, 1924, the court said:

> "A carrier is entitled to initiate rates and in this connection to adopt such policy of rate making as to it seems wise. *Interstate Commerce Commission* v. *Chicago, Great Western Railway Company,* 209 U. S. 108, 118-119. *Southern Pacific Company* v. *Interstate Commerce Commission,* 219 U. S. 433. *Interstate Commerce Commission* v. *L. & N. R. R. Co.,* 227 U. S. 88, 92."

A carrier has the undoubted right to so adjust its rates that it may meet competitive conditions and obtain or retain the traffic for its own line. The only limitation on the carrier's right to so initiate rates is that such rates must not be in conflict with the provisions of the Interstate Commerce Act. In *Texas & Pacific Railway Company, et al.* v.

United States of America, et al., decided May 29, 1933, 289 U. S. 627, at page 636, the court said:

> "As the carriers are in competition for the business they may, within the zone of reasonableness, prescribed by the statute, adjust their rates so as to obtain or retain the desired traffic for their own lines. *Interstate Commerce Commission* v. *Alabama Midland R. Co.* (C. C. A. 5th) 74 Fed. 715, 723, 724, 5 Inters. Com. Rep. 685, U. S. 144, 172, 173, 42 L. ed. 414, 425, 18 S. Ct. 45; *Skinner & E. Corp.* v. *United States,* 249 U. S. 557, 564, 73 L. ed. 772, 777, 39 S. Ct. 375; *United States* v. *Illinois C. R. Co.,* 263 U. S. 515, 522, 68 L. ed. 417, 424, 44 S. Ct. 189.
>
> "The theory of the Act is that the carriers in initiating rates may adjust them to competitive conditions, and that such action does not amount to undue discrimination. *Texas & P. R. R. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 40 L. ed. 940, 16 S. Ct. 666, 5 Inters. Com. Rep. 465."

The carriers have long been in competition in the movement of coal from the different mining origins to Rockford and Freeport and other northern Illinois destinations involved, and the proposed rates are not only necessary if the Milwaukee is to continue to transport coal from its mines in Indiana to this destination territory, but by the publication of the proposed rates the Milwaukee is simply restoring a long standing relationship between the rates from its mines to these destinations with the rates from other origins to the same destinations. (R. 144) By the proposed rates the Milwaukee is not attempting to secure traffic which has heretofore moved over other lines, but is simply attempting to retain to its own line traffic which it has enjoyed for many years.

2. *The Commission can only require the cancellation of schedules proposing new rates when after hearing there is a finding supported by evidence that such proposed rates are unlawful.*

The authority of the Commission to suspend or require the cancellation of rates is contained in Section 15 (7) of the Interstate Commerce Act, which provides in part as follows:

> "Whenever there shall be filed with the Commission any schedule stating a new, individual or joint rate, * * * the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate. * * *"

It will be noted that the statute authorizes the Commission to "enter upon a hearing concerning the lawfulness of such rate". It follows that unless the proposed rates are found from substantial evidence to be unlawful, the Commission has no right or authority under the Act to require the cancellation of rates initiated by the carrier. In *Interstate Commerce Commission* v. *L. & N. Ry. Co.* 227 U. S. 88, 92:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order."

See also *Texas & Pacific Railroad Company* v. *United States,* 289 U. S. 627.

3. *The Commission exceeded its power and its order is not supported by substantial evidence or essential findings.*

The Statute, Section 15, Paragraph 7 of the Act, authorizes the Commission to suspend proposed schedules of new rates and "to enter upon a hearing concerning the lawfulness of such rate". And further, "and after full hearing * * * the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it (the rate) had become effective".

The statute requires that the lawfulness of the proposed rates must be determined after a full hearing. The parties are entitled to know upon what facts and conclusions the Commission arrived at its decision, and in order that a court on review may intelligently pass upon the question as to whether or not the Commission has acted within the power delegated by Congress, it has repeatedly been held that the order of the Commission must be supported by appropriate findings. In the absence of such findings, the court is not "called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." *Florida* v. *United States,* 282 U. S. 194, 215. And the failure of the Commission to make appropriate findings "leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order". *Beaumont, Sour Lake & Western Railway Company* v. *United States,* 282 U. S. 74, 86.

That the court should look behind the mere formal findings of the Commission and examine the entire reports, to determine whether or not it has acted within the power

granted, is plain. In *Southern Pacific* v. *Interstate Commerce Commission,* 219 U. S. 443, 449:

> "While it is true that the opinion of the Commission may contain some sentences which, when segregated from their context, may give some support to the contention that the order was based upon a consideration merely of the intrinsic unreasonableness of the rate which was condemned, we think when the opinion is considered as a whole in the light of the condition of the record to which we have referred, it clearly results that it was based upon the belief by the Commission that it had the right under the law to protect the lumber interests of the Willamette Valley * * *."

(a) *The Commission's findings.*

In the light of the foregoing, let us examine the record and the reports of the Commission to determine what was actually done.

The duty of the court to go behind the mere formal conclusions of the Commission to ascertain exactly what was done and upon what facts and upon the application of what principles it has arrived at its conclusions is particularly important in this proceeding. *Southern Pacific* v. *I. C. C.* 219 U. S. 433. The original report (R. 7) contained no findings that the proposed rates were unlawful. The Commission recognized that the rate situation as between the two Indiana groups and the Illinois groups might be in need of correction, (R. 12) but it was not convinced that the Milwaukee had affirmatively justified the proposals.

Following this report the Milwaukee filed its petition for reconsideration (R. 223) which was denied by the entire Commission February 5, 1934. (R. 231) On March 7, 1934, after the Commission had been served with the Bill of Complaint filed in this cause February 14, 1934 (R. 1), the Commission on its own motion reopened the proceeding for further argument. No additional testimony was taken, but on April 18, 1934, two days before the case was to be heard in

the District Court, the Commission filed its second report. (R. 34)

It is obvious, we believe, that in the second report the Commission made an effort to meet the attack made on the original report and order in the Bill of Complaint. That it studiously examined the record in search of facts which might support the order, can be assumed. Its failure to refer to substantial evidence supporting the issues was simply because the facts are not in the record. The District Court had the entire record and all of the evidence before it, and after a carefully considered opinion (R. 48) found that the order was not supported by substantial evidence. (R. 56) The appellants, while asserting that there is substantial evidence to support the conclusion that the rate structure on coal will be threatened with a consequent loss in carrier revenue, have failed to quote one syllable of testimony from the record which will support such contention. The District Court did not pass upon conflicting evidence. It simply held after an examination of the record, that there was no substantial evidence to support the order. We submit that before the appellants are entitled to a reversal, they must point out wherein the District Court erred.

(b) *The findings in the first report of the Commission.*

In the first report of the Commission (R. 7, 12) there were no findings except the mere statement:

> "We find that the proposed schedules have not been justified."

The report clearly indicates that the Commission felt that it was justified in requiring the schedules to be canceled, if the Milwaukee had failed to establish that the proposed reduced rates were lawful. The statute, Section 15 (7) of the Act, which authorizes the Commission to enter upon a hearing as to the lawfulness of proposed rates, provides in part:

> "At any hearing involving • • • a rate • • •

> sought to be *increased* after the passage of this Act, the burden of proof to show that the increased rate * * * is just and reasonable, shall be upon the carrier. * * *"
> (Italics ours.)

The burden is placed upon the carrier proposing new rates only to establish that *increases* are *just* and *reasonable*. No such burden is placed on the carrier to justify *reduced* rates or that the proposed rates are otherwise lawful. In a well considered opinion in *Anchor Coal Company* v. *United States*, 25 Fed. (2) 462* (District Court, W. Virginia), the specially constituted three judge court in discussing this part of the statute, said on page 475:

> "It will thus be seen that, in the very act which for the first time gave to the Commission the power to establish minimum rates and prevent reductions, there was incorporated a provision placing upon carriers the burden of justifying only an increased rate. This is of importance, not only upon the principle '*Expressio unius est exclusio alterius*,' but also because it expresses a legislative policy favoring low rates. There is all of the difference imaginable between a proposition to raise and one to lower rates.
>
> "In the former case, the natural presumption is that the carrier will charge what the traffic will bear, and before he is allowed to increase his charges he should show that the increase proposed is justified by cost of operation or other valid criterion. Furthermore, the matters justifying the increase are matters peculiarly within the knowledge of the carrier proposing it. In the case of a reduction of rates, however, the self-interest of the carrier can ordinarily be depended on to guard against too great a reduction; and the reasons for denying the reduction, such as the effect on other carriers, are matters which are not peculiarly within the knowledge of the carrier offering the reduction, and could be better shown by the carriers injuriously affected."

The wording of the statute is plain and no other con-

*(As the issues had become moot before submission to this court, the Decree enjoining the Commission's order was reversed to dispose of the injunction. *United States* v. *Anchor Coal Company*, 279 U. S. 812.)

struction is tenable. While this court has not specifically interpreted the statute, it has said in reviewing an order of the Commission in an Investigation and Suspension proceeding:

> "Since the proposed tariff involved an increase in the rate, the burden of justifying the increase before the Commission was imposed upon the carrier by paragraph 7 of Section 15 * * *."

Atchison, Topeka & Santa Fe Railway Company v. *United States*, 279 U. S. 768, 773.

The Commission apparently recognized that it could not successfully defend the finding made in its first report, and accordingly other findings were made in the second report. (R. 34, 46)

It is asserted in the brief for the United States and Interstate Commerce Commission, page 61, that the Milwaukee neglected to raise a question concerning the burden of proof and proceeded without protest to offer its evidence, *first*, at the hearing before the Commission. The Government loses sight of the real objection to the requirement on the part of the Commission that the Milwaukee proposing reduced rates assume the burden of justifying their lawfulness. It is not a question of order of witnesses or procedure before the Commission, but a question as to whether or not, lacking evidence, the Commission may require the schedules to be canceled.

There was no finding in the first report that the rates were unlawful, and the Commission clearly exceeded the power delegated by Congress, by requiring the schedules of the Milwaukee to be canceled in so far as reliance is placed upon the original report and order. (R. 7) An examination of the second report and additional findings discloses that while there was an obvious attempt to meet the objections apparent on the face of the first report, the second report is also vulnerable to the same attack. Such

examination further indicates that the Commission misconceived its power and required the proposed schedules to be canceled, not because they were unlawful, but because the Commission believed, under the circumstances, that it could substitute its judgment for that of the management of the railroad.

(c) *The findings in the second report of the Commission.*

(1) *The mere statement in the words of the statute that the proposed rates were unreasonable in violation of Section 1 (5) was not an adequate finding and there was no substantial evidence that the rates were unreasonable.*

In the second report the Commission said:

> "We find the proposed rates would be unreasonable and in violation of Section 1 (5) and Section 15-a (2) of the Act." (R. 47)

The Commission's order should be set aside unless the findings supported by substantial evidence justify the cancellation of the rates because of a violation of one of the two sections referred to by the Commission. We will first consider the finding that the proposed rates would be "unreasonable in violation of Section 1 (5)."

It is obvious that the mere statement of a conclusion in the words of a statute is not a sufficient finding such as is required to support an order of the Commission. *Florida* v. *United States,* 282 U. S. 194, 213. The Commission is required to make such findings from the evidence as will make it possible to determine upon what grounds and facts the Commission acted. *Florida* v. *United States,* 282 U. S. 194, *Beaumont, Sour Lake & Western Railway Company* v. *United States,* 282 U. S. 74, *Norwegian Nitrogen Corporation* v. *United States,* 288 U. S. 294, 318.

The statement by the Commission that the rate is unreasonable is a mere statement of a conclusion or an opinion

and the parties are entitled to know by what standard and on what facts the conclusion was reached.

By what standard should a rate be measured to determine whether or not it is unreasonable? Section 1 (5) of the Interstate Commerce Act provides:

> "All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid or in connection therewith shall be just and reasonable and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. * * *"

To support the contention that a rate may be unreasonably low, the Commission refers to *Interstate Commerce Commission* v. *Railway Company*, 167 U. S. 479, 511. (R. 45) In that case the court said, referring to the Interstate Commerce Act:

> "The first section declares that the rate shall be reasonable and just and prohibits every unreasonable and unjust charge. Now the rate may be unreasonable because it is too low as well as because it is too high. In the former case it is unreasonable and unjust to the stockholders and in the latter to the shipper."

This expression of the court furnishes a definition of what might be an unreasonably low rate under Section 1 of the Interstate Commerce Act and we submit that there was no evidence or contention that the rates proposed were unreasonably low as measured by that standard.

In the brief filed by the railroads, appellants in this proceeding, we find on page 23:

> "There was no contention that the proposed rates of the Milwaukee were so low that they would not yield sufficient revenue to compensate it for its services in rendering transportation thereunder."

Rates might be considered unreasonably low if so low as to cast a burden on other traffic. It was neither suggested

nor contended that the proposed rates would cast a burden on other traffic.

The Commission made some rate comparisons which the United States and Interstate Commerce Commission argue by brief (page 53) justify a finding that the proposed rates are unreasonably low.

The fallacy of this argument is apparent, as these comparisons were made with schedules which had been prescribed as maxima. This proved nothing except possibly that the proposed rates were not in excess of maximum reasonable rates. This was not an issue as the Milwaukee admitted that the rates were less than maximum reasonable rates.

> "We can see how logically a rate might be condemned as too low when compared with a minimum rate from a competing community, but there is certainly no criterion by which it can thus be condemned when compared with a maximum rate."
>
> *Anchor Coal Co.* v. *United States,* 25 Fed. (2) 462, 475.

The Government calls attention to the comparison made by the Commission in *Coal Trade Association* v. *Baltimore & Ohio Railroad Company,* 185 I. C. C. 225, which was a maximum scale prescribed by the Commission for the transportation of coal from Indiana to Central Illinois. The scale prescribed by the Commission was a scale above which the carriers could not go, although they might publish lower rates, and there was no showing in the record as to what rates were actually assessed for the transportation of coal in that territory.

The Commission also made some comparisons (R. 39) of the rates from Springfield, Southern Illinois, Brazil-Clinton and Linton-Sullivan mining groups to Rockford and Freeport. Those rates applicable within Illinois were prescribed as maximum reasonable rates by the Illinois Commerce

Commission, and the Interstate Commerce Commission refused to require them to be increased. *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537. The comparison which the Commission makes indicates that the proposed rates from Indiana are relatively as high as those prescribed as maxima within Illinois. We submit that the Commission cannot arbitrarily conclude from such a comparison that a rate is unduly low.

While the rates which the Milwaukee proposed would apply only from mines on its line in Indiana to the destinations, in making the comparison the Commission used mileages which included the average short tariff routes from all mines in the two named Indiana mining groups. This inflated the mileage, as circuitous routes over which little or no traffic is moved, were included. To illustrate, the Commission used as the distance from Brazil-Clinton to Rockford, 272 miles. (R. 39) This was arrived at by including a circuitous two line joint route of the Pennsylvania Railroad of 332 miles from mines on its line over which the proposed rates would not apply. This route is over 100 miles in excess of the distance over the single route of the Milwaukee. (Ex. 8, R. 149) Other circuitous routes were included which tended to inflate the distance, (R. 149) although the fact is not disputed that the Milwaukee Railroad transports 99 per cent of the coal that moves to Rockford and Freeport from the two named Indiana groups. (82-86)

We submit that these comparisons give no support to the contention that the proposed rates were unreasonably low in violation of Section 1 (5). The Milwaukee railroad cannot lawfully be denied the right to publish a reasonable rate from mines on its railroad to the destinations in question simply because the same rate if applied over longer and circuitous joint line routes might appear to be low, without any evidence or finding that the rates from all of the mines in the two named Indiana groups should and could lawfully

be the same. This is especially true when it appears that the rates over the circuitous routes are mere paper rates, as little or no coal is moved via those routes.

To further emphasize the fact that the conclusion by the Commission that the rates would be unreasonably low in violation of Section 1 (5), was simply arbitrary, attention is called to the fact that while the Milwaukee proposes a rate of $1.70 from mines on its line in the Brazil-Clinton district to Rockford, it is required to join in rates from mines in the Springfield, Illinois, group to Rockford of $1.70 over routes which are much longer and which reach as a maximum 373 miles. (R. 147) Certainly the conclusion that a rate of $1.70 for the transportation of coal 231 miles, single line, is unreasonably low as compared with the same rate for 373 miles, joint line, is simply arbitrary and such a comparison offers no support for the finding.

While it is not contended that the proposed rates are maximum reasonable rates, it has long been recognized that there may be a zone of reasonableness between a reasonably high rate and a reasonably low rate. *Texas & Pacific Railroad Company* v. *United States*, 289 U. S. 627, 636.

The Commission made no appropriate finding that the proposed rates were unreasonable under Section 1 (5) of the Act, and it affirmatively appears that measured by any known standard, there was no evidence in the record from which such a finding could lawfully be made.

(2) *Finding of the Commission that the proposed rates would cause a disruption of the individual groups from which the rates are proposed, and the rate relation existing between the several Indiana groups and a disruption of the rate structure on coal in Indiana and related areas.*

The Commission found that if the proposed rates were permitted to become effective, they would cause a disruption of the individual groups from which the rates are proposed. The appellants argued at length that this would result. It must be admitted that if other railroads serving other mines in the two Indiana groups did not also reduce their rates, where they did publish the same rate as that which applied over the Milwaukee, there would be a disruption of whatever grouping now exists. Does that, however, support the contention that the proposed rates are unlawful? The propriety of the grouping was not before the Commission. It had not been prescribed by the Commission. In so far as there was a grouping of rates from the mines in the Brazil-Clinton and Linton-Sullivan districts to this territory, it had simply been voluntarily established by the carriers with circuitous routes to meet the rate of the Milwaukee applicable by its short and direct single line. The evidence indicated that the carriers now maintain different rates from these origin districts to many of the thirty-eight destinations in northern Illinois. (Ex. 8, R. 150, 151, 152)

Certainly, the Milwaukee railroad cannot be deprived of its right to publish a competitive compelled rate simply because that rate could not properly be applied from all mines on all railroads in those groups when there was no issue, no finding and no evidence to support a finding that all of the mines in the two Indiana groups should or could properly be grouped for rate making purposes. This is especially true since, it has been pointed out, the Milwaukee railroad was transporting 99 per cent of the coal from these

mining groups to Rockford and Freeport, the most distant cities in the destination territory. (R. 82-86)

What has been said with reference to the impropriety of requiring the rates to be canceled because they would result in the splitting of the Brazil-Clinton and Linton-Sullivan mining groups, can also be said with reference to the finding that the proposed rates would disturb the differential relationship between those mining groups and other mining groups in Indiana. The differential relationship between these groups has been voluntarily established by the carriers and not been prescribed by the Commission. The issue as to the propriety of the existing relationships was not before the Commission. No evidence was offered to support the contention that the existing differentials were proper, and the Commission did not and could not find from the record that they were lawful.

We submit that the Commission could not find the proposed rates to be in violation of Section 15 a (2) of the Act, simply because the existing differentials voluntarily maintained between the different Indiana origin groups would be disturbed without a record from which a finding could properly be made that the present differentials were lawful. In this connection it should be remembered that the relationship existing between the Indiana mines is no more important to the carriers than was the relationship between the Brazil-Clinton mines and the Springfield, Illinois, mines which had existed since 1910, and was not disturbed until the Illinois rates were reduced by order of the Illinois Commerce Commission, effective August 20, 1930. While it has been pointed out that the differential existing between the Brazil-Clinton and Southern Illinois mines to Rockford and Freeport had existed only since 1925, the relationship between these two groups was continuously the same as the relationship between the Southern Illinois and the Springfield, Illinois, groups. (R. 144)

We repeat that the Commission could not require the cancellation of the proposed rates simply because such rates if permitted to become effective would disrupt voluntary relationships between the different mining groups. Any new or different rate will always change existing relationships.

(3) *The finding that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in Indiana and related areas impairing the revenue of carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by Section 15 a of the Act.*

After stating that the proposed rates would split the Brazil-Clinton and Linton-Sullivan, Indiana, groups and would disrupt present differentials, in the next breath the Commission states that the groups would not be split and the differentials would not be disturbed, but that other carriers would make reductions which would impair the revenue of the carriers. While much has been said by the Commission in its reports and by the appellants in argument with reference to other reductions in rates which could follow if the proposed rates were permitted to become effective and the resulting loss in revenue which could be sustained by the carriers, we submit that the district court's finding that such issue was not supported by substantial evidence is the only conclusion which can be made from this record. We may assume that the appellants have diligently searched the record to find evidence to support the contention that other rates will be reduced, and that there will be a resulting loss in revenue.

We particularly desire to direct the court's attention to the character of testimony upon which they rely but fail to quote. (Brief for United States, page 58) They cite the

testimony of the assistant to the traffic manager of the Illinois Coal Traffic Bureau, Mr. Rosene, at page 117 of the record. He said:

> "I could not conceive of the idea of the Commission giving one certain mine in a group a lower rate than the rest of the points in the same particular rate making group. I would just naturally assume that if the rates from Brazil-Clinton come down to 15 cents, or 10 cents, or even a nickel, or whatever the change may be, the rest of the group will come down or go up with them."

Mr. Malum, appearing for the Springfield Coal Traffic Bureau, said on page 127 of the record:

> "Based on my experience in the coal business, as to what action I think the other Indiana originating lines would take in the event that the Commission were to permit the 17 cent reduction to go into effect from Milwaukee mines, I do not think there is any question but that it will spread to the other railroads serving the Brazil-Clinton and Linton-Sullivan groups and in time go down into the southern part of Indiana."

Mr. DeCamp, General Commerce Agent of the Illinois Central Railroad, said on page 129 of the record:

> "I firmly believe that if these reductions are confirmed and approved by the Interstate Commerce Commission, the ink will not be dry upon the order vacating the suspension before tariffs of competing lines in the same district will be issued, making the same reductions. Why, it will only be a matter of time, as I see it, in such event, before the Princeton and the Boonville groups will follow with similar reductions. * * * Now, if that should happen, which in all probability may be, all of Indiana goes down 17 cents. How long would it be before drastic requests and strong pressure would be exerted upon Illinois roads to make a similar reduction. Now, if that were done, which is possible, it would produce lower rates to Freeport and Rockford from the large originating groups in Illinois, than apply to Chicago."

The Commission accepted the foregoing statements and assumptions as evidence that rates in Indiana, Illinois and

Western Kentucky would all be reduced, resulting in a loss in carrier revenue. The District Court said that this was not substantial evidence. The foregoing quoted statements of the witnesses was all of the testimony upon which the Commission and appellants rely to establish that carrier revenue would be adversely affected, and that the ability of the carriers to provide adequate and efficient service would be threatened. If the Commission can accept as evidence such assumptions and conjectures made by a representative of a competing railroad, and thus forestall a review by the courts, the hearing provided for is mere form and the right to a review by the courts, specifically authorized by statute, becomes a fiction.

No witness representing any railroad appeared at the hearing and testified that his line would reduce any rates in the event the proposed rates became effective. Even Mr. DeCamp of the Illinois Central did not so state. The Commission has the power to suspend and require to be canceled any such proposed rates which might be made if found to be unlawful.

In suggesting that the rates to Chicago from Illinois origins might be reduced, the Commission entirely ignored the fact that it had prescribed minimum rates for application on that traffic which could not be reduced without first securing the consent of the Commission. *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537. Moreover, in suggesting that the rates might also further be reduced from Western Kentucky, the Commission neglected to state that it had fixed a definite differential between Western Kentucky and the Indiana mining groups; that if reductions were attempted from Western Kentucky to this destination territory, they would be in direct violation of the Commission's outstanding order in *Illinois Indiana Coal Cases,* 128 I. C. C. 265, 284.

The suggestion that there will be a loss in the revenue of the carriers in the event the proposed rates are permitted to remain in effect is not supported by any evidence, and important rights between parties should not be permitted to be determined on mere guesses and assumptions.

The Commission entirely lost sight of the loss in revenue which the Milwaukee will sustain in the event it is not permitted to continue to publish its rates on a parity with those from Springfield, Illinois. The other Indiana lines serving the Brazil-Clinton and Linton-Sullivan groups have little interest in these rates, as the evidence discloses that they have moved not more than one per cent of the traffic to these important destinations in the past. (R. 82 and 86) The evidence shows, however, that since the disruption of the long standing relationship between the Illinois rates and those from Brazil-Clinton and Linton-Sullivan, the Milwaukee has suffered material loss by the reduction in the amount of tonnage transported.

As pointed out by the Commission (R. 38) in comparing the volume of coal moved to Rockford in 1932 from the Springfield group, it was 245 per cent of that moved in 1929, and from the Brazil-Clinton group it was 39.6 per cent of that which moved in 1929, 1929 being the last full year that the two groups were on a parity. The record shows that there has been a continual decrease in the amount of coal moving from the Brazil-Clinton and Linton-Sullivan groups to this destination since 1930, and a continual increase of the movement from the Springfield, Illinois, group. (R. 217) The coal moving from the Brazil-Clinton and Linton-Sullivan groups to Rockford, 99 per cent of which is moved via the Milwaukee, decreased 50 per cent, 1932 under 1930, while the total consumption of coal at Rockford from all Indiana, Illinois and Western Kentucky decreased in the same years but 28 per cent. (R. 217) The Milwaukee has the right to so adjust its rates within

the zone of reasonableness to meet competitive conditions as in its judgment is necessary to retain the traffic. The Commission has no right simply to substitute its judgment. Unless there was evidence that the reduced rates would lead to a loss in carrier revenue, the Commission was not empowered to require their cancellation, under any claimed authority granted by Section 15-a (2). From a careful examination of those parts of the record to which appellants have referred, we find that no representative of any railroad testified that his railroad would reduce rates. Without evidence from which the Commission could properly find that the rates proposed were unreasonable for the service to be performed over the route they would apply and it is not contended that there was such evidence, the Commission could not lawfully require their cancellation simply because it assumed, without evidence, that other rates might be reduced. The service performed by other carriers serving other mines in the same and other groups was not in evidence and whether their present rates were too high or too low and the lawfulness of the present differentials was not determined by the Commission.

II.

THE DECREE OF THE DISTRICT COURT SHOULD BE AFFIRMED AS THE COMMISSION ACTED ARBITRARILY AND BEYOND ITS STATUTORY POWER, AND THE ORDER WAS NOT SUPPORTED BY APPROPRIATE FINDINGS OR BY SUBSTANTIAL EVIDENCE.

The appellants argue that the District Court simply reviewed the evidence and arrived at different conclusions than did the Commission. We have pointed out that the order is not supported by basic or essential findings and that there was no substantial evidence of the unlawfulness of the proposed rates. The District Court so found. (R.

56). While the court will not review disputed questions of fact, it will review questions of law, such as whether or not the Commission made essential findings or whether the findings were supported by evidence or were contrary to the evidence.

The statute, Section 46, of Title 28 of the United States Code (Judicial Code, Section 208) specifically authorizes suits to enjoin, set aside, annul or suspend an order of the Interstate Commerce Commission.

> "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."
>
> *Chicago Junction Case,* 264 U. S. 258, 265.

And as stated in *Interstate Commerce Commission* v. *L. & N. Railway Company,* 227 U. S. 88, at page 92:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. * * * The legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission, and the order based thereon is contrary to law and must, in the language of the statute 'be set aside by a court of competent jurisdiction.' 36 Stat. 551."

And if the authority therein involved has been exercised in an unreasonable manner so as to cause it to be within the elementary rule that "the substance and not the shadow determines the validity of the exercise of the power", it is void. *Interstate Commerce Commission* v. *Union Pacific,* 222 U. S. 541, 547.

While the Commission is not limited by the strict rules

as to the admissibility of evidence which prevail in suits between private parties,

> "the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered * * *. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding."
>
> *Interstate Commerce Commission* v. *L. & N. Railway Company*, 227 U. S. 88, 93.

We have already referred to the rule that the order must be accompanied by essential findings. *Florida* v. *United States*, 282 U. S. 194; *Beaumont, Sour Lake & Western Railway Company* v. *United States*, 282 U. S. 74; *Norwegian Nitrogen Products Corporation* v. *United States*, 288 U. S. 294.

The District Court had before it the entire record made before the Commission. The court analyzed the evidence and arrived at the conclusion that the order was not supported by substantial evidence. The evidence has been reviewed in other sections of this brief. The conclusion of the District Court, criticised by the appellants, that the testimony of Mr. DeCamp did not constitute substantial evidence that the carriers would suffer revenue losses, was purely a law question. The court has the right to pass upon the legal effect and the competency of the evidence.

In criticising the District Court's decision, the Government, to support its contention that there was substantial evidence, says on page 49:

> "The Commission approached the instant proceeding

> with an intimate knowledge of important facts, concerning competition, transportation conditions affecting both the carriers and the rates, the finely balanced differential relationships between the various groups in each State, and the long-standing relationships between the groups of mines in the respective States."

And then it cites and quotes from the Commission's decisions. We submit that the "intimate knowledge" of the Commission was not substantial evidence and that the consideration by the Commission of facts outside of the record violates the rule announced by this court.

We have examined with care reference made by appellants to parts of the record upon which they rely in support of the contention that there was substantial evidence supporting the order, and we respectfully submit that the conclusion at which appellants arrive is based on extraneous matters and assumptions which cannot be dignified as evidence. We submit that the appellants have wholly failed to point out wherein the District Court erred. The District Court was clearly right in holding that there was not substantial evidence in the record upon which important rights could be determined and that the order was void.

III.

THE COMMISSION DID NOT EXERCISE ITS POWER TO PRESCRIBE A MINIMUM RATE UNDER SECTION 15 (1) OF THE ACT.

The appellants devote attention to the proposition that the Commission is empowered by the Act to prescribe minimum rates. This is not disputed, nor is it an issue in this proceeding. Prior to the passage of the Transportation Act of 1920, the Commission did not have the power to condemn rates because unreasonably low. *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 565.

Since the amendment of Section 15 (1) by the Transpor-

tation Act of 1920, the Commission is empowered after full hearing, to prescribe the maximum or minimum, or maximum and minimum rate to be charged. In this proceeding the Commission did not fix a minimum rate or any rate, although it admitted that the rates might need correction. (R. 12). The Commission could have either on complaint or on its own investigation after hearing, prescribed minimum rates, not only from mines located on the Milwaukee railroad, but from mines in the related areas. In this proceeding, however, there was no evidence from which the Commission could have exercised its minimum rate making power. It is admitted that there was no evidence that the rates were less than compensatory and there was no evidence or contention that they were so low as to cause a burden on other traffic. With reference to the power to prescribe minimum rates, this court has said in *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627, 633:

> "The evidence failed to show that the rates of the Texas & Pacific and the L. R. & N. on export and import shipments to and from New Orleans were not compensatory. The Commission refused to find that they were so low as to cast a burden on other traffic. There was, therefore, no basis for an order fixing minimum reasonable rates under Section 15 (1) of the Act."

IV.

THE COMMISSION'S POWER TO PRESCRIBE RATES UNDER SECTION 15-A (2) OF THE ACT AS AMENDED.

The appellants discuss at some length the power of the Commission to prescribe just and reasonable rates under Section 15-a (2) of the Act as amended. We believe that the question as to whether or not the Commission's power was restricted by the enactment of the amendment is immaterial, as there was no evidence and the District Court so

found, that the proposed rates of the Milwaukee, if permitted to become effective, would adversely affect the earnings of the Milwaukee and any other railroad. (R. 53)

It is immaterial to the issues in this proceeding whether the District Court correctly interpreted the effect of the amendment. It must be admitted sound reasons may be advanced for the conclusion that a new rule for rate making was intended. The original act contained the so-called "recapture clause" and "the purpose of the changes in 15-a is not left in doubt. They were made with the manifest object of eliminating the provisions for the recapture of excess income of the carriers and the revising of the rule as to rate making. The requirement imposed by the Transportation Act, 1920, for the adjustment of rates according to groups was abolished * * *." *Florida* v. *United States*, 292 U. S. 1, 6.

While the Court held in *Florida* v. *United States, supra,* that "neither the elimination of the group method of rate making, nor the substituted rule" impaired the Commission's authority over intrastate rates under Section 13 of the Act, it did recognize that a change in the rule of rate making had been expressed.

The appellants cite the decision of the District Court in *Jefferson Island Salt Mining Co.* v. *United States,* 6 Fed. (2) 315, to support the contention that the Commission can prescribe minimum rates under Section 15-a (2) though lower rates are not shown to be non-compensatory. Though that case was decided in 1925 and before the amendment, we submit that there is nothing in the decision which lends support to the contention that the Commission's order herein is lawful. In that case the court reviewed an order of the Commission in which the rates and the relationship in the rates on salt were prescribed from many origins in different parts of the country to a large destination territory. We may assume and the District Court so held, that the

Commission had before it a record upon which such an order could lawfully be based.

That situation was very different than that before the Commission in this proceeding. Here the Commission required the cancellation of rates which would change relationships which the Commission had not prescribed and had not found to be lawful. Whether the Commission can now under the Act as amended prescribe rates so that carriers within a rate group "will under honest, efficient and economical management" earn a "fair return upon the aggregate value of the railway property of such carriers" is not an issue for the Commission did not prescribe such rates.

Conclusion.

The Commission misconceived its jurisdiction and has attempted to exercise power not delegated to it. It has ordered the cancellation of rates not shown to be unreasonable or otherwise unlawful. The effect of the order is to deny to the Milwaukee the right to exercise its managerial judgment and to so adjust its rates that it can continue to fairly compete in the transportation of coal to important consuming markets. The decree of the court below should be affirmed.

Respectfully submitted,

O. W. Dynes,
M. L. Bluhm,
C. L. Taylor,
Attorneys for Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Appellee.

J. N. Davis,
Of Counsel.
Chicago, Illinois,
January 7, 1935.

APPENDIX.

INVESTIGATION AND SUSPENSION DOCKET NO. 3843

COAL FROM INDIANA TO ILLINOIS.

Submitted October 5, 1933. Decided November 8, 1933.

REPORT OF THE COMMISSION.

DIVISION 2, COMMISSIONERS AITCHISON, PORTER, AND TATE.

TATE, *Commissioner:*

Exceptions to the proposed report were filed by respondent to which replies were made by the protesting carriers and by the Illinois Coal Traffic Bureau, and the case was orally argued.

By schedules filed to become effective on December 23, 1932, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, hereinafter called the Milwaukee, proposed to reduce the rates on bituminous coal, in carloads, from mines on its line in the Brazil-Clinton and Linton-Sullivan origin groups in Indiana to Rockford and Freeport, Ill., and to certain points intermediate thereto in that State. Upon protests filed by the Illinois Commerce Commission, certain competing carriers, and individual operators and coal-mining organizations in Illinois, the schedules were suspended until July 23, 1933. By voluntary action of respondent the effective date has been further postponed until January 23, 1934. Rates will be stated in amounts per net ton.

Southern Illinois is the principal coal-producing territory in Illinois, and the southern Illinois group, one of the several groups in that portion of the State, is considered the base group to destinations in northern Illinois and the Northwest. The rates from other Illinois groups and from western Kentucky are based differentially on those from the southern Illinois group. For many years prior to 1930 the coal rates from the Springfield group in Illinois and the Brazil-Clinton group in Indiana to the destinations here considered were maintained on a parity, 30 cents under those from the southern Illinois group. The rates from the other Indiana groups were and are made of differentials

over those from the Brazil-Clinton group. On August 20, 1930, by order of the Illinois Commerce Commission, the intrastate rates from the southern Illinois and Springfield groups were reduced from $2.17 to $2 and from $1.87 to $1.70, respectively, a reduction of 17 cents in each instance.

The present rate from the Brazil-Clinton group to Rockford and Freeport is $1.87, and from the Linton-Sullivan group $1.92. The Milwaukee proposed to reduce both of those rates 17 cents, to $1.70 and $1.75, thereby again placing the Brazil-Clinton group rate on a parity with that from the Springfield group, and basing the rate from the Linton-Sullivan group on the present differential of 5 cents over that from the Brazil-Clinton group. Reductions to the level of the rates proposed to Rockford and Freeport were also proposed to intermediate destinations.

Respondent considers all of the rates from Illinois, Indiana, and western Kentucky to this destination territory as less than reasonable maxima. But it feels that by reason of the lower rates from the Illinois groups it is being deprived of tonnage which could well move from mines on its lines in the Brazil-Clinton and Linton-Sullivan groups. It points out that although certain of its lines form through routes from those origin groups to Rockford and the other destinations here considered, they also afford the shortest routes from the Illinois groups in connection with other carriers, and that it is required to join in the lower intrastate rates therefrom on coal moving in competition with that from mines on its Indiana lines.

An exhibit introduced by the Illinois Central Railroad Company, protestant, indicates that the volume of coal moved to Rockford in 1932 from the southern Illinois group was 42.7 percent of that moved in 1929, from the Springfield group 245 percent, from the Brazil-Clinton group 141.1 percent, and from the Linton-Sullivan group 24.6 percent, from all groups in Illinois 53.4 percent, and from all groups in Indiana 87.7 percent. The same exhibit indicates that the volume of coal moved to Rockford in 1931 from the southern Illinois group was 54.3 percent of that moved in 1929, from the Springfield group 187.7 percent, from the Brazil-Clinton group 208.2 percent, from the Linton-Sullivan group 11.9 percent, from all groups in Illinois 58.4 percent, and from all groups in Indiana 88.7 percent. The carrier used 1929 for this comparison because that was the first full year prior to the reductions in the Illinois intrastate

rates, effective in the fall of 1930. At the argument the Milwaukee excepted to the percentage of 141.1 given by the Illinois Central as representing the 1932 movement of coal over that of 1929 from the Brazil-Clinton group to Rockford. The exception was based on a statement made at the hearing by an official of a coal company in that origin group that his company alone shipped more than twice the amount of coal shown in the exhibit as having moved from that group to Rockford in 1929. If the exhibit is in fact incorrect, no definite figures were given to show the extent of the error. The general statement of the Milwaukee that the 1929 movements from the Brazil-Clinton and Linton-Sullivan groups, as shown in the exhibit, were transposed cannot be accepted as definitely showing the movements from the two origin groups.

The Milwaukee urged that as the reduced rates were proposed to apply only from mines on its Indiana lines, the matter now before us relates only to the rates from those mines. It further stated that whatever action may be taken by the other lines serving the two origin groups toward meeting the proposed rates would be immaterial, as 95 to 99 percent of the coal moving therefrom to Rockforl and Freeport moves over its lines. We cannot subscribe to that statement, insofar as it relates to the pertinency of any action which might be taken by the other lines in the groups to meet reduced rates established by the Milwaukee. We have refused to find proposed reductions in rates justified when it is shown that they would be harmful to the rate structure as a whole. *Container Service,* 173 I. C. C. 377, page 430.

An exhibit introduced at the hearing indicates that six lines, in addition to the Milwaukee, serve either one or both of the Brazil-Clinton and Linton-Sullivan groups. The rates from the lower Indiana coal groups are generally based differentially on those from the Brazil-Clinton group. Witnesses expressed the view that if the proposed reduced rates are established by the Milwaukee similar reductions will be made, for competitive reasons, by other carriers in the same groups, and that reductions will be sought also from the lower Indiana groups. We are of the opinion that the grouping of the Indiana rates upon differential relationships cannot be ignored in the determination of this case.

In *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537, we stated that some of the rates therein as-

sailed from Illinois groups to Rockford and Freeport were well below the reasonable level of rates in that territory, but that the same seemed to be true of most of the rates from the Indiana groups to the same destinations. We pointed out that from the more distant Indiana groups to those destinations and to Dixon, Ill., the rates ranged as low as 56 percent of the scale prescribed in *Holmes & Hallowell Co.* v. *G. N. Ry. Co.*, 69 I. C. C. 11, and stated that sufficient justification had not been shown for requiring any of the intrastate rates to the destinations mentioned to be increased until the low rates from Indiana were placed on a level more nearly commensurate with the general level of rates in that territory.

At pages 549 and 550 of *Intrastate Rates on Bituminous Coal in Illinois, supra,* comparisons were made of the percentage relationships of the rates from the southern Illinois and Brazil-Clinton groups to Rockford and Freeport with those under the Holmes & Hallowell scale. For example, the rate from the southern Illinois group to Freeport is there shown as 64 percent, and from the Brazil-Clinton group to the same destination 67 percent, of the rates for similar distances under that scale. However, it now appears that the distance upon which the southern Illinois relationship was based was the short-line distance from that group, and that the Brazil-Clinton relationship was based on the average of the distances from all mines in the group. The following table, computed from distances taken from the present record, and apparently representing fairly the average of the short tariff routes from all origins on all lines in the groups, shows the percentage relationships of the rates from the origin groups indicated to Rockford and Freeport to the rates for similar distances under the Holmes & Hallowell scale.

Groups	To Rockford			To Freeport		
	Rate	Distance	Relation to Holmes & Hallowell scale	Rate	Distance	Relation to Holmes & Hallowell scale
		Miles	*Percent*		*Miles*	*Percent*
Springfield	$1.70	237.9	68.5	$1.70	261	63.7
Southern Illinois	2.00	365	60.9	2.00	384	58.8
Brazil-Clinton [1]	1.87	272	68.5	1.87	304	64
Linton-Sullivan [1]	1.92	298	67.1	1.92	327	63.1

[1] Respondent seeks to establish rates of $1.70 from the Brazil-Clinton group and $1.75 from th Linton-Sullivan group.

As previously pointed out, the Milwaukee seeks to establish the proposed rates of $1.70 and $1.75 not only to Rockford and Freeport, but also to stations on its lines in Illinois intermediate thereto.[1] It urges that any comparison of the distances and rates from the Indiana groups with those from Illinois should include such intermediate points. The average short tariff routes from all origins on all lines in the Springfield and Brazil-Clinton groups to all of the destinations named in the footnote average 252 and 257 miles respectively. To the last four destinations named, in the eastern portion of Illinois, the average distance from the Brazil-Clinton group, 231 miles, is less than that from the Springfield group by 11 miles. The average distances to all of the other stations named are 258 miles from the Springfield group and 274 miles from the Brazil-Clinton group. The table above shows that to Rockford and Freeport the average distances from the Springfield group are 34.1 and 43 miles, respectively, less than those from the Brazil-Clinton group.

The stations on the Milwaukee to which the reduced rates have been proposed do not take a group rate from the Brazil-Clinton group. The rate to De Kalb is $1.74, to Rockford and Freeport $1.87, and to all other points shown in the footnote $1.80, except that to Forreston, Byron, and Davis Junction the rate is $1.87 over the circuitous route in connection with the line of the Pennsylvania Railroad Company. The Milwaukee's proposal herefore involves a reduction of 17 cents in the rates from the two origin groups to Rockford and Freeport, as compared with a reduction of only 4 cents to De Kalb and 10 cents to the other intermediate points, with the exception of the rate over the circuitous route of the Pennsylvania as mentioned above. We are of the opinion that the distances from the Brazil-Clinton group to Rockford and Freeport, rather than those to all of the stations in the footnote, afford the proper basis for comparison.

Only the rates from mines on the Milwaukee in the Brazil-Clinton and Linton-Sullivan groups are before us in this proceeding. The immediate effect of the Milwaukee's proposal would be to split those groups, with lower rates

1. The principal stations on the Milwaukee between Rockford and Freeport and the Indiana border, as indicated by an exhibit of record, are Forreston, Byron, Davis Junction, Kirkland, Genoa, Elgin, Bensenville, and De Kalb, Ill.

from mines on that line than from mines on competing lines in the same groups. As pointed out herein, it is suggested by protestants that this condition would not long prevail, as the other carriers in those groups would propose similar reduced rates for competitive reasons. Such reductions would destroy the differential relationships now existing as between those groups and the other Indiana groups and western Kentucky, with the probability of mines and carriers in such other groups seeking similar reductions. This would result in a level of rates from the Indiana groups lower than that which we stated, in *Intrastate Rates on Bituminous Coal in Illinois, supra,* to be well below the reasonable level of rates in this territory.

While it may be, as the Milwaukee states, that the rate situation as between the two Indiana groups and Illinois groups is in need of correction, we are not at all convinced that the proposed rates would afford a lawful solution of the problem. To the contrary, we are convinced that any change in the present relationships in the Indiana-Illinois adjustment to these northern Illinois destinations should not be undertaken in the piecemeal manner here proposed.

We find that the proposed schedules have not been justified. An order will be entered requiring their cancellation and discontinuing this proceeding.

INVESTIGATION AND SUSPENSION DOCKET No. 3843.

COAL FROM INDIANA TO ILLINOIS.

Submitted April 6, 1934. Decided April 18, 1934.

REPORT OF THE COMMISSION ON ARGUMENT AND RECONSIDERATION.

TATE, *Commissioner:*

In the original report in this proceeding, 197 I. C. C. 245, division 2 found not justified the proposed reduced rates on bituminous coal, in carloads, from mines on the line of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, hereinafter called the Milwaukee, in the Brazil-Clinton and Linton-Sullivan origin groups in Indiana to Rockford and Freeport, Ill., and to certain points intermediate thereto in Illinois. An order was entered directing that the suspended schedules be canceled on or before January 22, 1934, and the proceeding discontinued. On January 2, 1934, the respondent filed a petition for rehearing, reargument and reconsideration before us, and for an extension of the effective date of the order. On January 5, 1934, the effective date of the order was postponed until February 22, 1934, but we denied the petition all other respects. Respondent then filed a petition in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking to enjoin the order entered by division 2. That petition was to have been heard on February 21, 1934, but the date for hearing has been postponed from time to time until April 20, 1934. On February 20, 1934, we further postponed until April 23, 1934, the effective date of the outstanding order, and on March 7, 1934, we reopened the proceeding for argument before us, which has been had. The facts are largely stated in the original report, and any so stated will be repeated herein only to the extent necessary. Rates and differentials in rates will be stated in amounts per net ton.

The coal areas in Indiana and Illinois are divided into several groups from which group rates apply. The principal Indiana groups are Brazil-Clinton, Linton-Sullivan, Princeton, and Boonville. The principal Illinois groups,

with which we are here concerned, are Springfield and southern Illinois. Keen competition in the sale of coal exists between the Indiana groups on the one hand, and the Illinois groups on the other hand, and also between the individual groups in each of the States named, at the destinations here considered. The rates from the various origin groups in Illinois are definitely related to each other. They are generally in conformity with the findings in the *Illinois Coal Cases, 1920,* 62 I. C. C. 741, and 64 I. C. C. 751. The rates from the various Indiana groups are closely related to the rates from the Illinois groups and are also differentially related to each other, but in general these relations have not been fixed by us. A differential of 35 cents over the southern Illinois group was fixed from western Kentucky to northern Illinois points, among others, in *Illinois-Indiana Coal Cases,* 128 I. C. C. 265, and recently affirmed in *West Kentucky Coal Bureau* v. *Illinois Central R. Co.,* 172 I. C. C. 279.

Southern Illinois is the principal coal-producing territory in Illinois, and the southern Illinois group, one of the several groups in that portion of the State, is considered the base group to destinations in northern Illinois and the Northwest. The rates from other Illinois groups and from western Kentucky are based differentially on those from the southern Illinois group. For many years prior to 1930 the coal rates from the Springfield group in Illinois and the Brazil-Clinton group in Indiana to the destinations here considered were maintained on a parity, 30 cents under those from the southern Illinois group. The rates from the other Indiana groups were and are made of differentials over those from the Brazil-Clinton group. On August 20, 1930, by order of the Illinois Commerce Commission, the intrastate rates from the southern Illinois and Springfield groups, among others, were reduced from $2.17 to $2 and from $1.87 to $1.70, respectively, a reduction of 17 cents in each instance, thus destroying the parity that had existed prior to that date, between the rates from the Indiana groups on the one hand, and the Illinois groups on the other. Like reductions were later published from the western Kentucky group so as to preserve the relation with the southern Illinois group prescribed in *Illinois-Indiana Coal Cases, supra.*

Subsequent to the reduction in the Illinois intrastate rates, the principal carriers, including respondent herein,

operating within the State of Illinois, filed a complaint with us, in which it was alleged that the reduced rates, hereinbefore referred to, on bituminous coal, in carloads, prescribed by the Illinois Commerce Commission were in violation of section 13 of the Interstate Commerce Act. They asked us to find that the rates assailed were unlawful and would cause an undue and unreasonable advantage, preference, and prejudice as between persons and localities in intrastate commerce on the one hand, and in interstate commerce on the other, and an undue, unreasonable and unjust discrimination against interstate commerce. Specific comparisons were made of the rates assailed from the Illinois groups to Rockford, Freeport, and other destinations with the rates from the Indiana groups to the same destinations. In the decision therein, *Intrastate Rates on Bituminous Coal in Illinois*, 182 I. C. C. 537, hereinafter called the *Illinois Case*, we found that the rates assailed on bituminous coal, in carloads, from mines in Illinois to Rockford, Freeport and other points, should not be found unlawful under section 13 of the act until and unless the interstate rates from Indiana groups to the same destinations were increased to a level more nearly commensurate with the general level of the rates on coal in that territory. Based on the rate comparisons introduced in that proceeding, we stated:

> While it is evident that a number of the assailed rates from Illinois groups to Rockford, Freeport, and Dixon are well below the reasonable level of rates in this territory, that appears to be true also of most of the rates from the Indiana groups to the same destinations. For example, the rate from the Brazil-Clinton group to Dixon is only 66.5 per cent of the Holmes & Hallowell scale, which is the same percentage of that scale as is reflected by the assailed rate from southern Illinois to Dixon; and the rate from Brazil-Clinton to Freeport is only 67 per cent of the scale, as compared with 64 per cent from southern Illinois to Freeport and 66 per cent from southern Illinois to Rockford. Rates from the more distant Indiana groups to these three destinations range as low as 56 per cent of the scale. The Illinois producers urge with much force that their rates to Rockford, Freeport, and Dixon should not be increased so long as such low rates from the Indiana groups to the same destinations are permitted to con-

tinue. The principal competition of the Illinois producers at these destinations comes from Indiana, and we find no sufficient justification for requiring any of the Illinois rates to these points to be increased until the low rates from Indiana referred to have been placed upon a level more nearly commensurate with the general level of rates in this territory.

In that proceeding several carriers, including respondent herein, introduced testimony to the effect that not only were the rates prescribed by the Illinois Commerce Commission too low, but that even the interstate rates from the Indiana mines were lower than reasonable maximum rates.

After the decision in the *Illinois Case,* the Milwaukee proposed to reduce the rates from mines on its line in the Brazil-Clinton and Linton-Sullivan groups to the destinations here considered, to the same extent that reductions were made in the intrastate rates in Illinois. Upon protests of several carriers, and Illinois coal operators, we suspended the proposed reduced rates which constitute the issue for determination in this proceeding.

The present rates to Rockford and Freeport from the Brazil-Clinton and Linton-Sullivan groups are $1.87 and $1.92 respectively. The Milwaukee proposes to reduce both of those rates 17 cents, to $1.70 and $1.75 from mines on its line, thereby again placing the rates from the Brazil-Clinton group on the parity which existed prior to August 20, 1930, with the rate from the Springfield group, and basing the rate from the Linton-Sullivan group on the present differential of 5 cents over the rate from the Brazil-Clinton group. Reductions to the level of the rates proposed to Rockford and Freeport are also proposed to intermediate destinations. In view of our finding in the *Illinois Case,* it is obvious that prior to August 20, 1930, producers in the Indiana groups had an advantage over their Illinois competitors at the destinations here considered which the proposed reduced rates from the Indiana groups would reestablish.

In the instant proceeding respondent again testified that all of the rates from Illinois, Indiana, and western Kentucky to the destinations here considered were less than reasonable maxima, thus corroborating the testimony introduced in the *Illinois Case.* For example, at the hearing,

Mr. J. T. Averitt, Coal Traffic Manager for the Milwaukee, testified on direct examination, in part, as follows:

> Let me say at the outset I shall not contend that the rates which are in effect from the two districts in Indiana served by our company are more than reasonable rates. As a matter of fact, they are less than reasonable maximum rates as are all the rates from Illinois, Indiana and Western Kentucky measured by any test evolved by the Commission in recent years. I do contend, however, for an equality of opportunity in these markets for the mines served by the Chicago, Milwaukee, St. Paul & Pacific Railroad, which, all conditions considered, they are entitled to have.
>
> Accordingly, rates were reduced from mines served by respondent from its Clinton and Linton, Indiana, groups in the same amount as they were required to be reduced from Illinois under orders of the Illinois Commerce Commission.

On cross-examination, Mr. Averitt testified, in part, as follows:

> "Q. (By Mr. Cardy) Mr. Averitt, as I understand it, the present rates from the Brazil-Clinton and Linton-Sullivan districts to Rockford, you say, are really less than reasonable maximum rates.
>
> A. I beg your pardon; I did not hear that.
>
> Q. I say, as I understand it, you say that even the present rates are less than reasonable maximum rates,—
>
> A I think that all of the rates in Illinois, Indiana and Western Kentucky, to Rockford and Freeport, are less than reasonable maximum rates"

Respondent contends, however, that by reason of the lower rates from the Illinois groups it is being deprived of tonnage that could well move from mines on its lines in the Brazil-Clinton and Linton-Sullivan groups, which it now attempts to regain by reducing its rates from those groups, despite the fact that it has testified that the present rates are lower than reasonable maximum rates. It points out that although certain of its lines form through routes from those origin groups to Rockford and the other destinations here considered, they also afford the shortest routes from the Illinois groups in connection with other carriers, and that it is required to join in the lower intrastate rates on

coal moving from mines in Illinois in competition with coal from mines on its Indiana lines on which it would perform the entire haul, and consequently receive the entire transportation charges.

An exhibit, as corrected at the argument, introduced by the Illinois Central Railroad Company, protestant, indicates that the volume of coal moved to Rockford in 1932 from the southern Illinois group was 42.7 percent of that moved in 1929, from the Springfield group 245 percent, from the Brazil-Clinton group 39.6 percent, and from the Linton-Sullivan group 88.1 percent, from all groups in Illinois 53.4 percent, and from all groups in Indiana 87.7 percent. The same exhibit indicates that the volume of coal moved to Rockford in 1931 from the southern Illinois group was 54.3 percent of that moved in 1929, from the Springfield group 187.7 percent, from the Brazil-Clinton group 58.4 percent, from the Linton-Sullivan group 42.5 percent, from all groups in Illinois 58.4 percent, and from all groups in Indiana 88.7 percent. The carrier used 1929 for this comparison because that was the first full year prior to the reductions in the Illinois intrastate rates. The increase in the tonnage of coal from the Springfield group to Rockford during 1931 and 1932 over the tonnage shipped in 1929 resulted from the distribution of coal for relief purposes at Rockford which coal was purchased at mines in the Springfield group because of the low prices prevailing in that group. This exhibit was introduced for the purpose of showing that, with the exception of the coal shipped from the Springfield group to Rockford for relief purposes, the decrease in the value of traffic from the Indiana mines to the destinations here considered, during 1931 and 1932, compared with the 1929 traffic (the year prior to the reduction in the rates from the Illinois mines), was less than the decrease in the movement from the Illinois mines to the same destinations during the same period. On the record we are of the opinion that the percentage of the tonnage from the Indiana groups to the destinations herein considered during the period shown had not decreased as a result of the reduced rates from the Illinois groups.

It appears that the distance, shown in the *Illinois Case*, upon which the southern Illinois relation was based was the short-line distance from that group, and that the Brazil-Clinton relation was based on the average of the dis-

tances from all mines in the group. The following table, computed from distances taken from the present record, and apparently representing fairly the average of the short tariff routes from all origins on all lines in the groups, shows the percentage relations of the rates from the origin groups indicated to Rockford and Freeport to the rates for similar distances under the Holmes & Hallowell scale:[1]

Groups	To Rockford			To Freeport		
	Rate	Distance	Relation to Holmes & Hallowell scale	Rate	Distance	Relation to Holmes & Hallowell scale
		Miles	*Percent*		*Miles*	*Percent*
Springfield	$1.70	237.9	68.5	$1.70	261	63.7
Southern Illinois	2.00	365	60.9	2.00	384	58.8
Brazil-Clinton	1.87(a)	272	68.5	1.87(a)	304	64
Brazil-Clinton	1.70(b)	272	62.3	1.70(b)	304	58.2
Linton-Sullivan	1.92(a)	298	67.1	1.92(a)	327	63.1
Linton-Sullivan	1.75(b)	298	61.2	1.75(b)	327	57.6

(a) Present.
(b) Proposed.

The Milwaukee objects to the use of the average distances as shown in the above table. It contends that the distances should be computed over its direct route and only from the mines on its line. For example, from mines on its line in the Brazil-Clinton group, the average distance over its direct route to Rockford is 231 miles. It compares the proposed rate of $1.70 from the Brazil-Clinton group to Rockford for 231 miles with a like rate from the Springfield group to Rockford for the average distance from all origins and over all routes, in an attempt to prove that the proposed rate from the Brazil-Clinton group is higher, distance considered, than the rate from the Springfield group. Such a comparison is worthless because like things are not compared. If the short tariff distances from mines on the Illinois Central in the Springfield group were used in comparison with the distance of 231 miles from mines on the Milwaukee in the Brazil-Clinton group, the comparison would favor the Springfield group from which the short tariff distance to Rockford is 199 miles. Such a method of computing distances would tend to destroy all groupings and cannot be adopted.

The Milwaukee urged that as the reduced rates were

1. *Holmes & Hallowell Co. v. G. N. Ry. Co.*, 69 I. C. C. 11.

proposed to apply only from mines on its Indiana lines, the matter now before us relates only to the rates from those mines. It stated that whatever action may be taken by the other lines serving the two origin groups toward meeting the proposed rates would be immaterial, as approximately 95 per cent of the coal moving therefrom to Rockford and Freeport moves over its lines. We do not agree with that statement, insofar as it relates to the pertinency of any action which might be taken by the other lines in the group to meet reduced rates established by the Milwaukee. The record indicates that six carriers, in addition to the Milwaukee, serve either one or both of the Brazil-Clinton and Linton-Sullivan groups. The proposal of the Milwaukee, if permitted to become effective, would not only disrupt the long-existing differential relation between the several Indiana groups, but it would also have the effect of splitting up the Brazil-Clinton and Linton-Sullivan groups, with lower rates from mines on the Milwaukee in these groups than from mines in the same groups and in the same immediate vicinity on the lines of other competitive carriers.

The coal-producing area in Indiana, consisting of several groups, extends southward from the Brazil-Clinton group (the so-called base group) to the Ohio River. The rates from the more-distant southern groups are based differentially over those from the Brazil-Clinton group. To the destinations here considered the rates from the Linton-Sullivan, Princeton, and Boonville groups are 5, 12, and 15 cents, respectively, higher than the rates from the Brazil-Clinton group. Stated otherwise, rates from the Linton-Sullivan group are 5 cents higher than rates from the Brazil-Clinton group; rates from the Princeton group are 7 cents higher than rates from the Linton-Sullivan group; and rates from the Boonville group are 3 cents higher than the rates from the Princeton group. This differential relation has been voluntarily established by the carriers, including respondent herein, serving the Indiana groups. The proposed reductions would increase the above differentials of 12 and 15 cents from the Princeton and Boonville groups to 29 and 32 cents, respectively, over the Brazil-Clinton group. On the other hand, if the suspended rates are permitted to become effective, and the present differential of 15 cents over Brazil-Clinton group rate is maintained, the rate from the Boonville group to the

destinations here considered would become 15 cents less than the rate from the southern Illinois group, although the distance is approximately 50 miles less from the latter group, thus tending to precipitate further reductions in the Illinois intrastate rates.

It is true, the rates from the more-distant southern Indiana groups are relatively lower, distance considered, than the rates from the Brazil-Clinton and Linton-Sullivan groups, but as the trend of the traffic is to the important markets to the north and northwest of the coal-producing areas, the existing relation is apparently for the purpose of enabling producers in the more-distant southern groups to compete in these markets with producers in the northern groups. Where a group relation has existed for many years, it should not be disrupted except upon very substantial evidence of which this record is devoid. Witnesses expressed the view that if the proposed reduced rates are permitted to become effective, similar reductions will be made, for competitive reasons, by other carriers in the same groups, and that reductions will be sought also from the more-distant southern Indiana groups.

Referring to the proposed reductions, Mr. R. P. De Camp, General Commerce Agent of the Illinois Central, testified in part as follows:

> • • • I firmly believe that if these reductions are confirmed and approved by the Interstate Commerce Commission, the ink will not be dry upon the order vacating the suspension before tariffs of competing lines in the same district will be issued, making the same reductions. Why, it will only be a matter of time, as I see it, in such event, before the Princeton and the Boonville groups will follow with similar reductions. In fact the Indiana operators on this record contend that if this reduction goes into effect from Brazil-Clinton and Linton-Sullivan mines on the Chicago, Milwaukee, St. Paul & Pacific Railroad, it should be extended to mines in the same groups, in the same amount of reduction maintained from the other groups to observe the existing differences or differentials.
>
> Now, if that should happen, which in all probability may be, all of Indiana goes down 17 cents. How long would it be before drastic requests and strong

pressure would be exerted upon Illinois roads to make a similar reduction? Now, if that were done, which is possible, it would produce lower rates to Freeport and Rockford from the large originating groups in Illinois, than apply to Chicago. * * *

* * * * * *

* * * I wish to say that this proceeding has, as I see it, the effect of splitting a group, in that lower rates are proposed from certain mines, than from all mines. Based on years of experience I have every reason to believe that that condition could not be maintained. Other roads serving the same groups would exert every effort possible to meet the suspended rates, if they were allowed to become effective. I do not see how, therefore, the reductions could be refused from the other Indiana groups south of these in issue. For illustration, I cannot conceive that the Chicago & Eastern Illinois Railroad, which serves the Princeton group as well as the Linton-Sullivan and Brazil-Clinton groups would sit idly by and not try to adjust their rates so as to participate competitively in the destination markets here in issue. And I have every reason to believe that if a uniform reduction of 17 cents prevailed from the Indiana groups, which compete so keenly with the Illinois groups, it would only be a matter of time before the entire rate structure would be disrupted, and unnecessarily reduced. * * *

We have refused to find proposed reductions in rates justified when it is shown that they would be harmful to the rate structure as a whole, and therefore are also harmful to the public interest. *Container Service,* 173 I. C. C. 377, 430. Respondent's proposal would have such an effect. In fact it would be difficult to conceive of a proposal more likely to precipitate unwarranted changes in a keenly competitive rate structure than that here proposed. The proposal, if approved, would result in a disruption of the present long-standing differential basis of rates on bituminous coal which has been voluntarily established by the carriers, including respondent, from the related Indiana groups to the destinations here considered, and would needlessly sacrifice the revenue of the carriers serving the Indiana groups, which would be harmful to the public interest. *Coffee from New Orleans,* 182 I. C. C. 453.

In *Intrastate Rates on Bituminous Coal within Ohio,* 192 I. C. C. 413, decided May 2, 1933, we commented upon the low level of the rates on coal in Illinois territory. Therein we said, at pages 427, 428:

> It was frequently referred to in this proceeding that the reduced rates in Ohio were established on the basis of the rates prescribed for application in Illinois, * * * and from Indiana to Illinois * * *. Elaborate comparisons were made between the Ohio reduced rates and those prescribed in Illinois territory. This evidence has had our consideration. It is generally conceded that the basis of rates on coal in the Illinois territory is the lowest in the country. This has greatly been brought about by a competitive condition differing from that in the Ohio territory, although some testimony was introduced to indicate that the actual operating conditions in Illinois are not more favorable than in Ohio. Chicago, in the Illinois territory, is the greatest coal market in this country, and * * * consumes annually 30,000,000 to 35,000,000 tons of coal. It was * * * stated that the rate level to Chicago is the result of keen competition between producers of eastern coal, moved both by rail and water-and-rail, and producers of Illinois and Indiana coals. Like competition also exists between carriers that have their own rails extending from particular groups in Illinois and Indiana to Chicago and whose principal interest is to move coal from their own mines. The rates to Chicago have had a depressing effect upon other rates on bitiminous coal in this territory and have resulted in the establishment many years ago of a competitive basis of rates that is on a very low level.

In the case last cited we stated that it is generally conceded that the basis of rates on coal in the Illinois territory is the lowest in the country. In the *Illinois case* we stated that while a number of the assailed Illinois intrastate rates were well below the reasonable level of rates in that territory, that also appeared to be true of most of the rates from the Indiana groups to the same destinations. In fact, in the latter case we found that the rates from the Indiana groups were somewhat lower than the rates from the Illinois groups. Despite the above finding, the Milwaukee proposes further reductions in the rates on coal from mines

on its line in certain Indiana groups to the destinations here considered.

In the *Illinois case* we prescribed a rate of $1.95 on coal from the southern Illinois group to Chicago, Ill. Therein we found that the continuation of the reduction of 5 cents prescribed by the Illinois Commerce Commission from the Illinois groups to Chicago and a similar reduction in the interstate rates from and to those points, and from the Indiana and western Kentucky groups, would result in a net annual loss to the carriers, based on the tonnage of recent years, of more than $600,000. The record in the instant case shows that certain routes from the southern Illinois group to Rockford operate through Chicago. If the rate from the southern Illinois group to Rockford is reduced a further 17 cents, as in all probability it would be, and which protestants argue would be inevitable, it would result in a rate of $1.83 to Rockford as against a rate 12 cents higher to Chicago, an intermediate point over certain routes. Such a rate could not be maintained to Chicago without fourth section relief. It would, however, be difficult to justify such relief because Chicago is a much more important market than Rockford, and would at least be entitled to a rate no higher than the rate to Rockford. Based on the coal tonnage to Rockford in 1932 from the Illinois, Indiana and western Kentucky fields, a 17-cent reduction would result in an annual revenue loss to the carriers approximating $48,600. Should the rate to Chicago be reduced to the level of the rate to Rockford, the net annual revenue loss to the carriers, based upon the tonnage of recent years referred to in the *Illinois case,* would exceed $1,400,000.

As previously pointed out, the Milwaukee seeks to establish the proposed rates of $1.70 and $1.75 not only to Rockford and Freeport, but also to points on its lines in Illinois intermediate thereto.[2] It urges that any comparison of the distances and rates from the Indiana groups with those from Illinois should include such intermediate points. The average short tariff routes from all origins on all lines in the Springfield and Brazil-Clinton groups to all of the destinations named in the footnote average 252 and 257 miles, respectively. To the last four destinations named, in the

2. The principal stations on the Milwaukee between Rockford and Freeport and the Indiana border, as indicated by an exhibit of record, are Forreston, Byron, Davis Junction, Kirkland, Genoa, Elgin, Bensenville, and De Kalb, Ill.

eastern portion of Illinois, the average distance from the Brazil-Clinton group, 231 miles, is less than that from the Springfield group by 11 miles. The average distances to all of the other stations named are 258 miles from the Springfield group and 274 miles from the Brazil-Clinton group. To Rockford and Freeport the average distances from the Springfield group are 34.1 and 43 miles, respectively, less than those from the Brazil-Clinton group. Under the proposed rates, the ton-mile revenue from the Brazil-Clinton and Linton-Sullivan groups would be 6.2 and 6 mills, respectively, to Rockford, and 5.5 and 5.3 mills, respectively, to Freeport, as compared with ton-mile revenue of 7.1 and 6.5 mills from the Springfield group to the same respective destinations. As respondent has testified that it considers the rates from Springfield as being lower than reasonable, it is difficult to perceive how it can justify the proposed reduced rates under which the revenue would be still lower than the revenue accruing under the rates from Springfield.

The stations on the Milwaukee to which the reduced rates have been proposed do not take a group rate from the Brazil-Clinton group. The rate to De Kalb is $1.74, to Rockford and Freeport $1.87, and to all other points shown in the footnote $1.80, except that to Forreston, Byron, and Davis Junction the rate is $1.87 over the circuitous route in connection with the line of the Pennsylvania Railroad Company. The Milwaukee's proposal therefore involves a reduction of 17 cents in the rates from the two origin groups to Rockford and Freeport, as compared with a reduction of 4 cents to De Kalb and 10 cents to the other intermediate points, with the exception of the rate over the circuitous route of the Pennsylvania as mentioned above.

Only the rates from mines on the Milwaukee in the Brazil-Clinton and Linton-Sullivan groups are before us in this proceeding. The immediate effect of the Milwaukee's proposal would be to split those groups, with lower rates from mines on that line than from mines on competing lines in the same groups. As hereinbefore indicated, it was testified by witnesses on behalf of protestants that this condition would not long prevail, as the other carriers in those groups would, for competitive reasons, publish similar reduced rates. Such reductions would destroy the differential relations now existing as between those groups and the

other Indiana groups, with the probability of mines and carriers in such other groups seeking similar reductions. The reductions here proposed if permitted to become effective would result in a level of rates from the Indiana groups lower than that which we stated, in the *Illinois case*, to be well below the reasonable level of rates in this territory, and would probably lead to further reductions in the Illinois intrastate rates with like reductions in the rates from western Kentucky for the purpose of preserving the differential basis over the rates from the southern Illinois group prescribed by us, thus needlessly sacrificing the carriers' revenues and impairing their ability to render adequate and efficient railway transportation service.

In *Coal Trade Assn.* v. *Baltimore & O. R. Co.*, 190 I. C. C. 743, decided January 24, 1933, division 4 prescribed reasonable rates based on distance on bituminous coal, in carloads, from the Brazil-Clinton, Linton-Sullivan, Princeton-Ayrshire, and Boonville groups in Indiana, to destinations in eastern-central Illinois, including such points as Arcola, Champaign, Decatur, Danville, Effingham, Bloomington, and Hoopeston. The basis therein prescribed applies for distances up to and including 300 miles. For 272 and 298 miles the rates are $2.07 and $2.15, respectively, as compared with the rates of $1.70 and $1.75, respectively, proposed by respondent herein for like distances from the Brazil-Clinton and Linton-Sullivan groups, to Rockford. If the rates be extended at the rate of progression shown for the two last 25-mile blocks, they, for 304 and 327 miles, the respective distances from the Brazil-Clinton and Linton-Sullivan groups to Freeport, would be $2.23 and $2.31, as compared with rates of $1.70 and $1.75, respectively, from the Brazil-Clinton and Linton-Sullivan groups to Freeport, proposed by respondent. The rates proposed herein would approximate 82 per cent to Rockford and 76 per cent to Freeport of the rates prescribed for like distances in the above case. In addition to disrupting the differential relation existing between the several Indiana groups, the proposed rates, compared with rates recently prescribed for like distances in this general territory, would be unreasonably low.

That a rate may be unreasonable because of being too low as well as because of being too high was recognized by the Supreme Court as long ago as *Interstate Com. Commission* v. *Railway Co.*, 167 U. S. 479, 511.

In *Ex-Ohio-River Coal to Ohio Points,* 185 I. C. C. 211, proposed reduced rates on ex-river coal between points in Ohio were found not justified, chiefly because of the effects which those rates would have on the all-rail movement of coal to Ohio destinations. There the rates were not challenged as less than reasonable minima or as casting an undue burden on other traffic. Division 4 said, page 219:

> To upset or seriously to menace a general rate structure lawfully established suffices to make proposed rates calculated to effect such a disruption unreasonable and unlawful. *Trunk-Line and Ex-Lake Iron Ore Rates,* 69 I. C. C. 589. That principle was followed in *Grain and Grain Products,* 115 I. C. C. 153, with the statement that approval of the schedules there considered would inevitably lead to a disruption of the grain-rate structure, would have marked effects upon distribution and marketing, the extent of which could not be adequately foreseen, and of necessity would impair the carriers' revenues and their ability to render satisfactory service.

The reasonableness under section 1 of the act which we have thus the power and the duty to find in the rates here protested is supported by the provisions of section 15a. In *Ex-Lake Iron Ore from Chicago to Granite City,* 123 I. C. C. 503, we said:

> Plainly we are justified in condemning a rate on the ground that it is unreasonably low, where it is shown that it will cause loss rather than gain to the publishing road or roads and will thus impose a burden upon other traffic. In suspension proceedings, in view of the burden of proof, we are justified in condemning a proposed rate, protested as too low, if the carriers which sponsor it do not sufficiently show that it will cause gain rather than loss. But our authority, in our opinion, goes further. We are justified in condemning a proposed rate as too low if the evidence warrants the conclusion that it will, because of its lowness, tend to precipitate changes in rate structure or in traffic which will be harmful to the public interest, having in mind our responsibility for railroad earnings in general under section 15a.

Under Transportation Act, 1920, there was imposed on us an affirmative duty "to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States." *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R. Co.,* 257 U. S. 563.

That act was amended by the Emergency Transportation Act, 1933. There somewhat different language was used, as follows:

> 15a. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

The new legislation made even more imperative our duty to fix rates that will enable an adequate railway service to be maintained. As to this the effect of the amended act is: "the substituted rule of rate making by its express terms emphasizes the carriers' need of adequate revenues". "The new Act discloses no intention to weaken national control for essential national purposes over the railway system of the country. It was rather designed to aid that control in the light of the depressed economic condition of the railways." *Florida et al.* v. *United States et al.*, decided by the United States Supreme Court, April 2, 1934.

In No. 26210, *Gasoline from San Francisco Bay Points to Ogden, Utah*, ... I. C. C. ....., decided February 6, 1934, in exercising the minimum rate power conferred on us by the act, we found certain reduced rates established by the Southern Pacific Company on gasoline from refineries on and adjacent to San Francisco Bay to Ogden, Utah, and certain intermediate points to be unjust and unreasonable, and prescribed a reasonable minimum rate.

We find that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.

We find that the proposed rates would be unreasonable and in violation of sections 1 (5) and 15a (2) of the act.

The findings in the original report are affirmed.

McMANAMY, *Commissioner*, dissenting:

As stated by the majority, the order of the Illinois Commerce Commission of August 20, 1930, reducing the rates from the southern Illinois and Springfield groups, destroyed the parity which had previously existed between the rates from the Indiana groups on the one hand and the Illinois groups on the other. Like reductions have been published from the western Kentucky group to preserve the relationship with Illinois. The rates here under suspension represent an effort on the part of the Chicago, Milwaukee, St. Paul & Pacific to retain its traffic by restoring the relationship which previously existed in so far as that carrier can do so. If, as we have found, the rates prescribed by the Illinois Commission are not unreasonably low or otherwise unlawful, I am unable to see wherein the rates here involved are unlawful.

FARRELL, *Commissioner*, dissenting:

For reasons the same in substance as those stated by me in my dissenting expression in the Gasoline Case referred to in the report, No. 26210, I am unable to concur in the conclusions of the majority. The pertinent facts do not appear to me to establish a violation of paragraph (5) of section 1 of the interstate commerce act, and therefore can not indicate a violation of paragraph (2) of section 15a of the act, because the latter paragraph covers only matters to be considered by the Commission in prescribing just and reasonable rates to take the place of those it finds to be unreasonable, upon such record as may be made in the full hearing provided for in paragraph (1) of section 15 of the act.

The fact that the reductions in rates proposed by the Milwaukee will interfere with group adjustments heretofore made by and between carriers serving Indiana mines does not appear to me to be a sufficient reason for denying to the Milwaukee the right it would otherwise have under the act. Also, it will be observed that the Milwaukee is simply endeavoring to reestablish, as between mines on its lines in Indiana on the one hand and mines in the Springfield, Illinois, group on the other, the parity of rates which existed during many years prior to August 20, 1930, and that subsequent to the date mentioned the carriers serving mines in western Kentucky were permitted to make a like readjustment.

MEMORANDUM OPINION OF DISTRICT COURT.

On the fourteenth day of February, A. D. 1934, Chicago, Milwaukee, St. Paul & Pacific Railroad Company filed its bill of complaint herein praying that a preliminary or interlocutory order or injunction be entered restraining and suspending the enforcement, operation and execution of an order of the Interstate Commerce Commission by Division 2, dated the eighth day of November, A. D. 1933, Investigation and Suspension Docket No. 3843 cancelling certain proposed tariffs on bituminous coal filed with the Commission by the plaintiff and that defendant, United States of America, its officers and agents be enjoined and restrained from enforcing said order until the final determination of this case and that upon final hearing herein a decree be entered perpetually enjoining suspending, annulling and setting aside the enforcement, operation and execution of said order.

Following the filing of the bill of complaint the Commission postponed the effective date of said order until April 23, 1934. On March 7, 1934, the Commission reopened said proceedings for oral argument and consideration and on the eighth day of April, the Commission made and filed its report with its findings of fact and conclusions thereon and ordered that the order theretofore entered on the eighth of November, 1933, be affirmed. These subsequent proceedings by the Commission were brought to the attention of the court by a supplement to the original bill herein. Answers have been filed by the original defendant and intervenors, briefs and arguments submitted and the cause submitted to the court for final determination.

On the twenty-second day of November, 1933, the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, plaintiff, filed tariffs with the Interstate Commerce Commission to become effective on the twenty-third day of December, 1932, which fixed rates of $1.70 per ton on bituminous coal from mines on its railroad in Clinton District, located in Vermillion and Bigo Counties in the State of Indiana to various destinations located on its railroad in Northern Illinois including Rockford and Freeport and also fixed rates of $1.75 per ton on bituminous coal from mines on its railroad in the Linton District located in Vigo,

Sullivan, Greene and Clay Counties in the State of Indiana to each of said destinations in Northern Illinois, said rates of $1.70 and $175 per ton, respectively, constituting reductions of ten cents per ton under the rates theretofore in effect from said Clinton and Linton Districts in Indiana to eight of the said destinations, reductions of four cents per ton to five of the destinations and seventeen cents per ton to the remaining destinations, including Rockford and Freeport; that prior to the effective date of said tariffs certain associations representing coal producing interests in Illinois and certain railroads serving coal mines in Illinois and the Illinois Commerce Commission filed protests with the Commission against the said tariffs and asked the Commission to institute a proceeding inquiring into the lawfulness of the proposed rates and tariffs; that on the twenty-second day of December, 1932, the Commission entered its order suspending the operation of said proposed tariffs until the twenty-third day of July, 1933, and have since entered an order cancelling such tariffs.

It appears from the evidence taken before the Commission that for many years prior to the twentieth day of August, 1930, plaintiff was engaged in the transportation of bituminous coal from the mines in said mining districts in Indiana to destinations in Illinois, including Rockford and Freeport, and that the rates applicable for movement of said coal from said Clinton District in Indiana to Rockford, Illinois, from the first day of April, 1913 to the twentieth day of August, 1930, were the same as rates from the so-called Springfield Group in Illinois to Rockford, Illinois; that in a certain proceeding pending before the Illinois Commerce Commission said Commission by an order which became effective on the twentieth day of August, 1930, reduced the rates on bituminous coal moving intrastate from the origin mines in Illinois to Rockford and Freeport, seventeen cents per ton; that subsequently in a proceedings before the Interstate Commission under Section 13 of the Interstate Commerce Act in which it was urged that the rates required by the Illinois Commerce Commission, to be assessed as maxima for the transportation of coal from mines in that said district to Rockford and Freeport, Illinois, were unlawful and caused undue and unreasonable advantage, preference and prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other hand and as unjustly and

unreasonably discriminating against interestate commerce, a hearing was had before the Interstate Commerce Commission and said Commission (182 I. C. C. 537) refused to require the said Illinois intrastate rates to be increased. It found in that case that the rates fixed by the Illinois Commerce Commission for the hauling of bituminous coal to Rockford and Freeport should not be found unlawful under Section 13 of the Act until and unless the Interstate rates from the Indiana groups (including the Brazil-Clinton and Linton-Sullivan groups) to the same destinations were increased to a level more nearly commensurate with the general level of the rates on coal in this territory (p. 564).

In the hearing under consideration in this case on the proposed rates of the Milwaukee, while it was admitted that its present rates are below a reasonable maximum there was no evidence presented that such rates were below a reasonable minimum nor that they were non-compensatory. The Commission based its final order solely upon findings that "the proposed rates, if permitted, to become effective would lead to a disruption of the rate structure on coal in Indiana and related areas thus impairing the revenue of the carriers serving these areas and their ability to provide the adequate and efficient transportation contemplated by Section 15 (a) of the Act; that they would cause a disruption of the individual groups from which the rates are proposed; and they would cause a disruption of the long standing rate relations existing for competitive purposes between the several Indiana groups," and that the proposed rates would be unreasonable and in violation of Section 1 (5) and 15 a (2) of the Act.

There seems to be no question but that the Milwaukee is in a position to serve the mines in the Brazil-Clinton and Linton-Sullivan groups which are on its lines at a much cheaper rate than other carriers whose lines touch coal mines in the same vicinity and more cheaply than the lines in Illinois can carry coal from the Northern Illinois and Springfield groups to Rockford and Freeport. The protestants in the hearing before the Commission made no attempt to show that the proposed rates of the Milwaukee were unreasonable low for the services given. The sole contention of the protestants was that the lower rates proposed by the Milwaukee would disrupt the general rate structure on coal from the various mining groups in Indi-

ana, Kentucky and Southern Illinois. To support this contention they produced as a witness one R. R. De Camp, General Commerce Agent of the Illinois Central Railroad who testified that he firmly believed that if the proposed reduction in rates by the Milwaukee were confirmed and approved by the Commission before the ink would be dry upon the order vacating the suspension of the proposed rates of the Milwaukee new tariffs of competing lines in the same district would be issued making the same reduction and if that should happen all of Indiana would go down seventeen cents; further that he had every reason to believe that if a uniform reduction of seventeen cents prevailed from the Indiana groups which compete so keenly with the Illinois groups it would be only a matter of time before the entire rate structure would be disrupted and unnecessarily reduced.

We do not feel that a mere belief of a witness as to what may happen in the future, even if he be an expert, is entitled to much weight as evidence. The belief in this case does not appear to have been founded upon facts or scientific observation as is required of an expert in any other line before his opinion becomes competent. The finding of the Commission, however, appears to be based solely upon such expressions as to the future effect of the proposed rates of the Milwaukee.

The Commission finds, as stated above, that the proposed rates of the Milwaukee are in violation of Section 1 (5) and 15 a (2) of the Interstate Commerce Act. Section 1 (5) provides simply that "all charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable." There is no evidence that the proposed rates in and of themselves are unreasonable. The carrier has a right to initiate rates. *United States* v. *Illinois Central Railroad Co.* 263 U. S. 516. There is no presumption that a rate so initiated is unreasonably low. *On the contrary the* burden is upon the party complaining to establish that fact, and in the absence of evidence the initiate rate must stand. *Anchor Coal Co.* v. *United States,* 25 F. (2) 462.

A reduction by the Milwaukee of the coal rates will, other things being equal, benefit both the consumers of coal at the points of destination and the producers of coal at the points of origin, and as said by the court in *Texas and Pac. Ry. Co.* v. *United States,* 289 U. S. 627, 638, "The Act

was passed for the protection of those who pay or bear the rates."

Further the Milwaukee has the right within the zone of reasonableness to adopt such rates as will enable it to obtain or retain desired traffic for its own lines. *Texas and Pac. Ry. Co.* v. *United States, supra.* It has a through line from coal mines in the Brazil-Clinton and Linton-Sullivan groups to Rockford, Freeport and certain intermediate destinations. It has adopted a rate which will enable those mines to undersell in the destinations mentioned, coming from mines not so favorably situated, with the result that the Milwaukee will derive a greater revenue and the buyers of coal at those destinations will obtain that commodity at a lower price. In the absence of evidence that the proposed rate is not compensatory or below a reasonable minimum there is nothing in Section 1 (5) of the Act which justifies the Commission in setting it aside.

There still remains the question whether the order of the Commission is authorized by Section *15 a (2)*. It is on this Section the Commission and the defendants herein seem principally to rely. The reason, and the only reason, given for cancelling the proposed rates is that a rate war would likely result and the present rate structure would be disrupted. As a matter of fact the rate structure was disrupted when in 1930 the Commerce Commission permitted reductions from the mines in Springfield and Southern Illinois to Freeport, Rockford and intermediate destinations.

There is no evidence in the record that the present rate structure is fair or that it is reasonable; no evidence that its disruption would necessarily lead to the introduction of unfair or unreasonable rates. Further, that situation is within the control of the Commission. It is not necessary that it sanction other changes of rates, if such new rates are below a reasonable minimum, or are non-compensatory.

Section 15 a (2) of the Act as amended in 1933 provides that the Commission, in the exercise of its power to prescribe just and reasonable rates, shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with furnishing such service; and to the need of revenues sufficient to enable the carriers, under honest, economical and efficient management to pro-

vide such service. There is no evidence that the proposed rates of the Milwaukee will interfere with adequate and efficient railway service. Some mention was made in the evidence of the fact that some mines in the Brazil-Clinton and Sullivan-Linton districts, a very small proportion of all the mines in the two districts are not located so they can be served by the Milwaukee but have to depend on other lines of railroad which would have to carry the coal by a much longer route and through other connecting carriers to deliver it to Rockford, Freeport and other destinations involved in this proceeding. But we do not understand the Act to mean that the Commission should compel a carrier to charge a rate higher than a reasonable minimum, and compel shippers favorably located to pay such higher rates in order to favor other mines less favorably located or to increase the revenue of other carriers having a less direct route to the destinations involved.

Defendants have called our attention to *Jefferson Island Salt Mining Co.* v. *United States,* 6 F. (2d) 315, as supporting their contentions, stating that is the only direct decision on the question of the power of the Commission to prescribe minimum rates, even in the absence of evidence that the existing rate which that minimum required to be increased was non-compensatory or in itself unreasonably low from the carrier's viewpoint. But that case was decided under Section 15a (2) as it stood after the amendment of 1920, and it was very considerably changed by the amendment of 1933. As it stood in 1920 the Commission was authorized to initiate, modify, establish or adjust rates so that carriers *as a whole* (or as a whole in each of such rate groups as the Commission might from time to time designate) would under honest, efficient and economical management earn an annual net operating income equal as near as might be to a fair return upon the aggregate value of the railway property of such carriers held for and used for in the service of transportation. There is nothing in the section as it now stands authorizing the Commission to establish rates above a reasonable minimum for one railroad merely to enable another railroad in the group not so well situated, to earn a fair return, even if the Act of 1920 did so provide. Nor is there any evidence in the record that the proposed rates of the Milwaukee if allowed to stand will so affect the earning capacity of any other railroad.

It is our opinion that the order of the Commission should be perpetually enjoined.

STATUTES.

The Interstate Commerce Act, as amended, provides in part:

SEC. 1 (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * * (c. 104, 24 Stat. 379, as amended; c. 3591, 34 Stat. 584; c. 309, 36 Stat. 544; c. 91, 41 Stat. 474; U. S. C., Title 49, Sec. 1).

SEC. 15 (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the

Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. (C. 91, 41 Stat. 484; U. S. C., Title 49, Sec. 15.)

15 (7). Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in

whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. (C. 309, 36 Stat. 551; c. 91, 41 Stat. 484; c. 510, 44 Stat. 1447; U. S. C. Sup. VII, Title 49, Sec. 15 (7).)

SEC. 15a (2) [As amended June 16, 1933]. In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service. (C. 91, 48 Stat. 220, U. S. C. Sup. VII, Title 49, Sec. 15a.)